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Financial Assurance for Closure and Post-Closure Care: Requirements for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities

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ICF, Inc.
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Washington, DC 20006

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Requirements for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities

A Guidance Manual

REPRODUCED BY
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FINANCIAL ASSURANCE FOR CLOSURE AND POST-CLOSURE CARE: REQUIREMENTS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

A GUIDANCE MANUAL

This document (SW-955) was prepared for the Office of Solid Waste under contact no. 68-01-6491

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1982

PREFACE

This manual was prepared by ICF, Inc., 1850 K Street, N.W., Suite 950, Washington, DC 20006, under EPA Contract No. 68-01-6491. The EPA project officer was Carole J. Ansheles.

This document was compiled in order to provide guidance to owners and operators in complying with the requirements for financial assurance of closure and post-closure care; and to EPA Regional staff in implementing the requirements.

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I. INTRODUCTION

A. ORGANIZATION OF MANUAL

This manual is organized to communicate information necessary to ensure that adequate financial responsibility is provided for the proper closure and post-closure care of hazardous waste facilities. This introduction provides a general background for understanding the financial requirements and how the manual is organized. It is followed by an overview of the requirements themselves in Chapter II. The overview outlines general responsibilities applicable to all financial assurance mechanisms. The following chapters focus on the specific mechanisms in the order of their appearance in EPA regulations:

Chapter III	Trust Funds
Chapter IV	Surety Bonds
Chapter V	Letters of Credit
Chapter VI	Insurance
Chapter VII	Financial Test and Corporate Guarantee
Chapter VIII	State-Required Mechanisms and State Assumption of Responsibility

In each of the chapters, the discussion is organized as follows:

A. Overview--Introduces the financial assurance mechanism, highlights key terms and special considerations, and presents the applicable regulations.

B. Requirements of the Mechanism--Explains what must be done by owners or operators and the financial community for EPA to approve use of the mechanism.

C. Regional Office Responsibilities--Describes the activities and functions which EPA Regional Offices will perform.

D. Sources of Further Information--Provides references to useful documents or other sources of information.

E. Attachments--Includes checklists and required wording of instruments.

The manual focuses on the interim status financial requirements of 40 CFR 265 (Subpart H) and includes separate sections which discuss any special requirements for permitted facilities (40 CFR 264).

The appendix to the manual contains a glossary of key terms. Terms included in the glossary will be identified by the use of CAPITAL LETTERS in the first use of the term within each chapter.

B. BACKGROUND

As part of the "cradle to grave" regulation of hazardous wastes under the Resource Conservation and Recovery Act of 1976 (RCRA), EPA has developed standards for:

- proper closure of hazardous waste treatment, storage, and disposal facilities;
- post-closure care and monitoring of disposal facilities such as landfills and surface impoundments; and
- assuring the availability of funds for closure and/or post-closure activities.

These standards require the owner or operator of a hazardous waste facility to develop plans for closure and (if applicable) post-closure, to prepare cost estimates based on those plans, and finally, to demonstrate the ability to pay for closure and/or post-closure. This demonstration must be accomplished by using one or more financial assurance mechanisms specified by EPA. This manual describes how these mechanisms may be used. Other EPA guidance addresses closure and post-closure plans and cost estimates.

The specific requirements which are applicable to an owner or operator depend on:

(1) The type of facility involved, because not all facilities have post-closure obligations and different types of facilities may have different closure requirements;

(2) The status of the facility involved, because the rules distinguish between existing facilities with "interim status" (40 CFR 265) and facilities which are operating under a RCRA permit (40 CFR 264) and

(3) The state where the facility is located, because many states are in the process of being authorized to administer their own hazardous waste programs and may be promulgating rules that are not identical to federal EPA requirements.

"Sources of Further Information" (included at the end of this chapter) outlines how these rules appear in the Code of Federal Regulations (CFR), the dates of publication in the Federal Register, and the appropriate EPA Guidance Manuals on RCRA closure and post-closure requirements (See Exhibits I-3 through I-5). This introduction includes a discussion of owner or

operator responsibilities as well as an explanation of the relationship between state and federal requirements.

C. PURPOSE

This manual has three primary purposes:

(1) To assist owners, operators, and the financial community in understanding their responsibilities and fulfilling requirements in a timely fashion;

(2) To assist Regional Administrators in developing effective procedures to implement the requirements; and

(3) To promote uniform and coordinated implementation within and among Regions to ease the burden on owners or operators, the financial community, and EPA personnel.

To accomplish these goals, the manual describes the responsibilities of the regulated community, the tasks that must be performed, and the future contingencies that may arise. Similarly, the manual outlines the functions which Regional Offices must perform and future problems they may encounter. Checklists and sample submissions are provided as well as sources of further information.

D. OWNER OR OPERATOR RESPONSIBILITIES

All hazardous waste management facilities are subject to closure requirements (except for facilities that only store wastes for 90 days or less). However, only disposal facilities where hazardous wastes are to remain after closure are subject to post-closure requirements. (See 40 CFR 265.110.) To satisfy closure and post-closure requirements, owners and operators of hazardous waste facilities must prepare closure and post-closure plans, as applicable, and cost estimates based on those plans. States and the federal government only are exempt from the standards for cost estimates and financial assurance; all other owners and operators must satisfy those requirements as well.

The RCRA financial requirements regulations apply to <u>both</u> the owner and the operator of a hazardous waste management facility. The actual provision of financial assurance, however, may be offered by <u>either</u> the owner or operator. EPA will consider both parties responsible for carrying out the requirements, and leaves it up to the parties themselves to undertake, share, or divide the actual provision of financial assurance.

Owners or operators should be sure to provide their financial institutions with the name and telephone number of the EPA Regional contact, the required wording of instruments included in this manual, as well as copies of the

regulations cited in Exhibit II-3. The regulations themselves may be obtained by contacting the RCRA Hotline (800) 424-9346 (toll free) or (202) 382-3000, or the Superintendent of Documents, Washington, D.C. 20402. If financial institutions have questions about specific procedures or issues not covered in the regulations, they may contact the RCRA financial specialist in each EPA Region. See Appendix A.

Until permits have been issued under RCRA, EXISTING FACILITIES are subject to the INTERIM STATUS rules. When a facility receives a RCRA permit, the rules for PERMITTED FACILITIES will apply (See Exhibit I-3). In contrast to other RCRA standards, the financial requirements for interim status and permitted facilities are quite similar. Therefore, the chapters describing the individual financial mechanisms are based on the interim status requirements; however, each chapter includes subsections which detail any provisions unique to permitted facilities.

This guidance document is based on the revised interim final rules on financial requirements for closure and post-closure care published in the Federal Register on April 7, 1982 and effective as of July 6, 1982. These rules have been designed and revised to facilitate the goal of assuring that funds will be available for proper closure and post-closure care of hazardous waste management facilities. EPA Regional Offices have designated personnel to answer questions and provide materials. (See Appendix A-1.) EPA Headquarters may also be consulted through the RCRA HOTLINE (800-424-9346 toll free or 202-382-3000). Appended to each chapter of this manual are other useful sources of further information.

E. EPA HEADQUARTERS ROLE

Because this is a new program, problems may arise that either must be resolved case-by-case or had not been anticipated by the regulations (or this guidance). To assure uniformity of implementation, EPA Regional Offices should communicate with EPA Headquarters to determine if such problems have arisen elsewhere and to discuss options for resolving the questions. Further guidance or memoranda will be distributed by Headquarters as additional issues are resolved. Owners or operators and financial community representatives are also free to contact Headquarters but should initially discuss all questions with the Regional Office staff (see Appendix A) or appropriate state agency (see Appendix B) who have primary responsibility for implementing the requirements and overseeing compliance. (See Section F below.)

As administrative experience with the financial assurance standards accumulates, allocation of responsibility between Headquarters and the Regional Offices for review of compliance may shift in certain circumstances to exploit potential efficiencies. For example, the feasibility of centralizing and automating annual review of financial test data is under investigation. Headquarters currently envisions that the Regional Offices will play the lead role in determining compliance with financial assurance

standards. Headquarters will act as a clearinghouse of information and source of technical assistance.

In order to foster unified implementation of the financial requirements, Headquarters will be available to provide guidance on review of financial assurance demonstrations which apply to more than one EPA Region; procedures for coordination with Enforcement; and responses to bankruptcies of owners or operators, their corporate guarantors, and financial institutions.

F. RELATIONSHIP BETWEEN STATE AND FEDERAL REQUIREMENTS

The Resource Conservation and Recovery Act (RCRA) does not prevent states from independently enacting closure or post-closure financial requirements, and a number of states have done so. Moreover, under RCRA, states may apply to EPA for the authority to administer a state hazardous waste management program in lieu of federal implementation of such a program; these states must have financial requirements equivalent to the federal rules to obtain such authorization. Thus, hazardous waste facilities may be subject to state financial requirements and must satisfy applicable rules, whether promulgated as part of an EPA-authorized state program or independently.

In addition to determining what state financial requirements exist (if any), owners or operators must also determine whether facilities are located in states that have received EPA authorization to administer hazardous waste programs in lieu of RCRA. State program authorization typically proceeds in "Phases," prior to final authorization. Thus, as of May 10, 1982, twenty-nine states had received PHASE I INTERIM AUTHORIZATION, including three states which have also received PHASE II INTERIM AUTHORIZATION. See Exhibit I-1. Once a state has received either Phase I or II interim authorization, owners or operators need comply only with whatever state financial assurance requirements exist, if any.

Owners or operators should be aware of how the phases of the state authorization process relate to the RCRA financial requirements. First, to receive Phase I interim authorization, a state need not have established financial assurance requirements. However, such requirements must be established and substantially equivalent to RCRA standards for a state to receive Phase II interim authorization. In either case, interim status facilities are not subject to federal RCRA financial requirements, only such state requirements as exist will apply. Owners or operators should note that Phase II authorization may well establish some additional financial requirements for interim status facilities.

Beyond this, facilities need comply only with permit requirements, whether a permit is State or Federally-issued. If a RCRA permit is issued to a facility in a state that does not have Phase II authorization, federal requirements (40 CFR 264) apply in addition to any independent state permit requirements. States with Phase II authorization may issue permits in lieu of RCRA permits for one or more categories of hazardous waste facilities; federal

EXHIBIT I-1

STATES WITH INTERIM AUTHORIZATION AS OF MAY 10, 1982

Alabama	Louisiana	Oregon
*Arkansas	Maine	Pennsylvania
California	Maryland	Rhode Island
Connecticut	Massachusetts	South Carolina
Delaware	Mississippi	Tennessee
Florida	Montana	*Texas
Georgia	New Hampshire	Utah
Iowa	*North Carolina	Vermont
Kansas	North Dakota	Virginia
Kentucky	Oklahoma	Wisconsin

* These states have received Phase II interim authorization in addition to Phase I.

requirements do not apply to permits issued by a state under Phase II authorization. Of course, such a state must have financial assurance requirements that are substantially equivalent to federal standards.

Exhibit I-1 lists the states with interim authorization as of May 10, 1982. Since some "Phase I" and non-authorized states do have financial requirements, owners and operators should contact the appropriate state agency (see Appendix B) or the EPA Regional Office for more specific information. To the extent that state requirements are similar to RCRA rules, Chapters II through VII of this manual can be used to supplement materials available from state agencies. However, no submissions to EPA Regional Offices are required, and reference to Chapter VIII will not be necessary.

State and/or federal officials may and/or need to review the financial assurance offered by the owner or operator to determine if it satisfies applicable requirements. Whether it is a state and/or Federal agency that is responsible for that determination depends on the authorization status of the state program, and on whether the state has financial responsibility requirements of its own. Exhibit I-2 shows the appropriate authority for review. The owner or operator should therefore ascertain which agency is responsible for review, and submit all documents for review to that agency.

EXHIBIT I-2

WHERE TO SEND FINANCIAL REQUIREMENTS DOCUMENTS FOR FACILITIES WITH INTERIM STATUS

Status of State Program Authorization	Does State Have Its Own Requirements? Yes	No
No Authorization	Send to state and EPA. (Case 1)	Send financial information to EPA only. (Case 2)
Phase I Interim Authorization	Send to state only. (Case 3)	No submission necessary. (Case 4)
Phase II Interim Authorization	Send to state only. (Case 3)	Not applicable

In states with financial requirements but neither Phase I nor Phase II authorization (Case 1), the owner or operator must comply with state financial assurance requirements and submit the assurance for review to the EPA Regional Administrator by the effective date to determine whether the RCRA requirements are satisfied. This is discussed in detail in Chapter VIII.

In states with no financial requirements and no state program authorization (Case 2) the owner or operator need only submit documents to EPA which satisfy federal RCRA requirements, as described in this manual.

In states with closure or post-closure financial requirements and either Phase I or Phase II authorization (Case 3), owners or operators should submit all required financial assurance information to the state program officials only.

In a Phase I state without its own financial requirements (Case 4) owners or operators are not required to submit any financial assurance information. Any information that is required, however, would be submitted to the state. A facility in a Phase I state that applies for a RCRA permit, however, must comply with federal requirements.

In a state which has not received authorization but has financial requirements the satisfaction of state financial requirements may not always satisfy the requirements of federal EPA rules. For example, a state may establish financial requirements based on only ten-to-fifteen years of post-closure care as opposed to the up-to-thirty years (or more) which can be required under the federal system. In these cases, owners or operators may have to provide additional assurance to satisfy federal financial requirements. Where state rules are stricter than federal EPA provisions, no additional financial assurance demonstrations will ordinarily be required. This situation is discussed in Chapter VIII.

G. SOURCES OF FURTHER INFORMATION

EXHIBIT I-3

CLOSURE AND POST-CLOSURE REGULATIONS
40 CFR Parts 264 and 265, Subparts G and H

Facility Status & Type		Closure Plans	Post-Closure Plans	Cost Estimates	Financial Requirements
Storage Treatment and Disposal Facilities	Interim Status	40 CFR 265.112	N/A	40 CFR 265.142	40 CFR 265.143
	Permitted facility	40 CFR 264.112	N/A	40 CFR 264.142	40 CFR 264.143
Disposal facilities Only	Interim Status	40 CFR 265.112	40 CFR 265.118	40 CFR 265.144	40 CFR 265.145
	Permitted facility	40 CFR 264.112	40 CFR 264.118	40 CFR 264.144	40 CFR 264.145

Source: Title 40, Code of Federal Regulations (CFR).

EXHIBIT I-4

FEDERAL REGISTER CITATIONS FOR LATEST
CLOSURE AND POST-CLOSURE REGULATIONS

Topic	Regulatory Status	Federal Register
(1) Closure and Post-Closure Plans		
(a) Permitted Facilities	Interim Final	46 FR 2849-2851 January 12, 1981
	Amendment (Minor)	46 FR 7678 January 23, 1981
(b) Interim Status	Revised Interim Final	46 FR 2875-2877 January 12, 1981
(2) Cost Estimates		
(a) Permitted Facilities	Interim Final	46 FR 2802-2847 (Preamble) 46 FR 2851-2852, 2856 (Regulations) January 12, 1981
	Amendment (Minor)	46 FR 7666-7678 (Preamble) 46 FR 7678 (Regulations) January 23, 1981
	Amendment (Minor)	47 FR 15044 (Preamble) 47 FR 15047, 15052 (Regulations) April 7, 1982
(b) Interim Status	Final	45 FR 33154-33220 (Preamble) 45 FR 33243-33244 (Regulations) May 19, 1980
	Amendment/Extension of Time Period	45 FR 72039-72040 October 30, 1980

EXHIBIT I-4 (continued)

FEDERAL REGISTER CITATIONS FOR LATEST CLOSURE AND POST-CLOSURE REGULATIONS

Topic	Regulatory Status	Federal Register
(2) Cost Estimates (b) Interim Status (continued)	Restated	46 FR 2802-2847 (Preamble) 46 FR 2877-2878, 2880-2881 (Regulations) January 12, 1981
	Amendment (Minor)	47 FR 15044 (Preamble) 47 FR 15064, 15069 (Regulations) April 7, 1982
(3) Financial Responsibility Requirements		
(Permitted Facilities and Interim Status)	Revised Interim Final	47 FR 15032-47 (Preamble) 47 FR 15047-74 (Regulations) April 7, 1982
	Corrections to Trust Agreement Wording	47 FR 19995 May 10, 1982

EXHIBIT I-5

CURRENT BACKGROUND DOCUMENTS OR GUIDANCE
40 CFR Parts 264 and 265, Subparts G and H

(1) Closure and Post-Closure Plans	Background Document, Interim Status Standards and General Status Standards for Closure and Post-Closure Care (EPA, December 31, 1980).
	Closure and Post-Closure: Interim Status Standards (FINAL DRAFT GUIDANCE, November 1981, General Research Corp.).
(2) Cost Estimates	Final Draft Guidance for Subpart H of the Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities (FINAL DRAFT GUIDANCE, November 1981, General Research Corporation).
(3) Financial Assurance for Closure and Post-Closure Care	Background Document, Parts 264 and 265, Subpart H, Financial Requirements, Final Regulations (EPA, December 31, 1980).
	Background Document for the Financial Test and Municipal Revenue Test (EPA, November 30, 1981).
	Financial Assurance for Closure and Post-Closure Care: Requirements for Owners or Operators of Hazardous Waste Treatment, Storage and Disposal Facilities (GUIDANCE, 1982, ICF Incorporated).
	See also documents cited in Chapter VII.

II. OVERVIEW OF FINANCIAL REQUIREMENTS

This chapter presents an overview of the RCRA financial assurance requirements, including responsibilities common to all the mechanisms acceptable for compliance. More detailed information about each mechanism is contained in the chapter on that mechanism.

A. OVERVIEW OF RESPONSIBILITIES

This section briefly reviews the major responsibilities of the three parties to most financial assurance mechanisms, the owner or operator, the Regional Office, and the financial institution or parent guarantor. Each of the steps described here is discussed in greater detail in the rest of this chapter. Summary checklists are provided as Attachments II-1 and II-2 at the end of this chapter.

1. Owner or Operator Responsibilities

To select a mechanism for complying with closure and post-closure financial assurance requirements, owners or operators will want to consider such factors as the cost and availability of alternative mechanisms, tax treatment of payments, and effects on balance sheets. Many owners or operators would benefit from an initial discussion with their own bank, accountant, or financial advisor regarding the relative advantages of the different mechanisms for complying with the regulations.

Once the owner or operator decides upon a mechanism for complying with the RCRA financial assurance regulations, it must approach a qualified financial institution or parent and negotiate the terms of the assurance. The financial institution may request detailed information from the owner or operator before the financial assurance deal will be consummated. The owner or operator will have to make sure that the financial assurance mechanism is in the amount and form required by EPA, is signed as required, is in effect at the appropriate time, and is submitted to the Regional Office when required.

During the operating life of the facility and while the financial assurance mechanism is in force, the owner or operator will have to increase the amount of the assurance to take into account cost estimate increases due to inflation or any changes in closure or post-closure plans. The owner or operator may also request from the Regional Administrator a reduction in assurance when cost estimates decrease.

When the financial institution enters bankruptcy or otherwise loses its qualifications to provide assurance under the regulations, the owner or operator must obtain alternative means of financial assurance. When ownership or operating responsibility for the facility is transferred, or a change in the method of assurance is sought, termination of the existing assurance

mechanism will only be permitted once substitute financial assurance has otherwise been obtained. When the financial institution or parent guarantor exercises its right to cancel assurance, the owner or operator may have only 90 days to obtain replacement assurance.

When closure begins, the owner or operator may begin submitting itemized bills to the Regional Administrator for reimbursement. When closure is complete and again when post-closure care is complete, the owner or operator will want to apply to the Regional Administrator to be released from financial assurance requirements.

The responsibilities of the owner or operator are summarized in Attachment II-1.

2. Regional Office Responsibilities

The Regional Administrator has the lead responsibility for assisting the owner or operator to understand and comply with the RCRA financial responsibility requirements. The Regional Office must institute procedures for reviewing and administering the financial assurance information submitted by the owners and operators in its region. First, the Regional Office must be certain that the financial institution qualifies to provide assurance under the regulations. Second, the assurance must be provided in the proper amount and form, it must be signed by both the owner or operator and the financial institution (or someone properly acting on their behalf), and it must be in effect and submitted to the Regional Administrator by the required dates.

While financial assurance is in effect, the Regional Office will have to make certain that the assurance mechanism is updated during the operating life of the facility to reflect adjustments to cost estimates due to inflation and changes in cost estimates resulting from new plans. Increases in cost estimates must be covered by additional assurance, while owners or operators may request reduction in assurance when cost estimates decrease.

The Regional Office must also be sure that assurance is maintained in the event of bankruptcy of the financial institution or if the institution or parent guarantor ceases to remain qualified. The Regional Office must also permit the owner or operator to terminate assurance only when alternate assurance is being provided by the present or a new owner or operator. If the financial institution or parent guarantor sends notice of cancellation, the Regional Office must assure that either alternate financial assurance is provided within 90 days or the mechanism is used to fund closure and/or post-closure care.

The Regional Office should authorize reimbursement of closure and/or post-closure care expenses only after itemized bills are submitted and it is determined that the expenses are in accordance with the plan or otherwie justifiable. When payment for closure is being made from a TRUST FUND or pursuant to INSURANCE, the Regional Administrator may withhold reimbursement

until closure is completed if he believes that the cost of closure will be significantly greater than the amount of assurance provided. Finally, the Regional Office will need to release owners and operators from financial assurance requirements once closure is complete and later, when post-closure care is complete.

The responsibilities of the Regional Office are summarized in Attachment II-2.

3. Financial Institution or Parent Guarantor

The financial institution or PARENT GUARANTOR becomes involved in the RCRA Subpart H requirements only because of the agreement it enters into with the owner or operator. As a result, the responsibilities of the financial institution or parent guarantor are prescribed by the instrument itself and its accompanying documentation and applicable state and federal regulations. In all cases, the financial institution and the owner or operator are responsible for ensuring that the wording of the instrument is identical to the regulations. Most of the other major obligations of the financial institution vary from mechanism to mechanism and are specified in the instrument.

One important feature is common to most methods of financial assurance involving a financial institution or a corporate guarantor -- cancellation. Notice must be given to both the owner or operator and the Regional Administrator 120 days before cancellation. If alternate assurance is not provided by the owner or operator within 90 days, the financial institution or parent guarantor will remain responsible according to the terms of the mechanism. The Regional Administrator is authorized to draw upon or enforce financial assurances prior to the effective date of their cancellation.

B. FINANCIAL ASSURANCE OPTIONS

This section is divided into two parts. The first describes the individual financial assurance mechanisms that are available to owners and operators under the RCRA financial assurance regulations. The second part describes how and when several different financial assurance mechanisms can be used together. Exhibit II-1 lists the financial assurance regulations by mechanism, while Exhibit II-2 gives an overview of these regulations by subject area.

1. Summary of Different Mechanisms

TRUST FUNDS assure payment of closure or post-closure costs from a fund held in trust by a bank or other qualified entity. The owner or operator deposits money over time into the fund, which is invested by the financial institution. Payments into the fund are generally made annually; the size of the payments required depends on the value of the trust fund at that time, the amount of cost estimates being assured, and the period over which payments are

EXHIBIT II-1

FINANCIAL ASSURANCE MECHANISMS REGULATIONS

Mechanism	Interim Status	Permitted Facility
Trust Funds		
Closure	40 CFR 265.143(a)	40 CFR 264.143(a)
Post-Closure	40 CFR 265.145(a)	40 CFR 264.145(a)
Financial Guarantee Bonds		
Closure	40 CFR 265.143(b)	40 CFR 264.143(b)
Post-Closure	40 CFR 265.145(b)	40 CFR 264.145(b)
Performance Bonds		
Closure	Not applicable	40 CFR 264.143(c)
Post-Closure	Not applicable	40 CFR 264.145(c)
Letters of Credit		
Closure	40 CFR 265.143(c)	40 CFR 264.143(d)
Post-Closure	40 CFR 265.145(c)	40 CFR 264.145(d)
Insurance		
Closure	40 CFR 265.143(d)	40 CFR 264.143(e)
Post-Closure	40 CFR 265.145(d)	40 CFR 264.145(e)
Financial Test and Corporate Guarantee		
Closure	40 CFR 265.143(e)	40 CFR 264.143(f)
Post-Closure	40 CFR 265.145(e)	40 CFR 264.145(f)
State-Required Mechanisms	40 CFR 265.149	40 CFR 264.149
State Assumption of Responsibility	40 CFR 265.150	40 CFR 264.150

Source: Title 40, Code of Federal Regulations (CFR).

EXHIBIT II-2

OVERVIEW OF FINANCIAL REQUIREMENTS REGULATIONS

Topic	Interim Status	Permitted Facilities
Definitions	40 CFR 265.141	40 CFR 264.141
Adjusting cost estimates for inflation	40 CFR 265.142(b)	40 CFR 264.142(b)
Use of multiple financial mechanisms; Use of one mechanism for multiple facilities	40 CFR 265.143(f),(g) (closure) 40 CFR 265.145(f),(g) (post-closure)	40 CFR 264.143(g),(h) (closure) 40 CFR 264.145(g),(h) (post-closure)
Release from Requirements	40 CFR 265.143(h) (closure) 40 CFR 265.145(h) (post-closure)	40 CFR 264.143(i) (closure) 40 CFR 264.145(i) (post-closure)
Combination of mechanisms (closure and post-closure)	40 CFR 265.146	40 CFR 264.146
Incapacity of owner, operator, guarantor, or financial institution	40 CFR 265.148	40 CFR 264.148
Wording of Instruments	40 CFR 265.151	40 CFR 264.151

Source: Title 40, Code of Federal Regulations (CFR).

to be made. A fee is usually charged for the institution's services. Through the payments into the fund and the income received on the investments, the trust fund is expected to grow until it is large enough to cover the estimated expenditures for closure and/or post-closure care. As these expenditures are made, EPA authorizes reimbursement from the trust fund. See Chapter III for details.

SURETY BONDS under RCRA are of two types: FINANCIAL GUARANTEE BONDS (which are allowed at both interim status facilities and permitted facilities) and PERFORMANCE BONDS (allowed only at permitted facilities). In a financial guarantee bond, a SURETY guarantees that a specific amount of money will be available for closure and/or post-closure care if the owner or operator fails to fulfill its obligations. A PREMIUM is charged to the owner or operator for this guarantee. In a performance bond, the surety may either perform closure and/or post-closure care or pay the PENAL SUM of the bond, if the owner or operator fails to fulfill its obligations. Under either type of bond, the owner or operator establishes a STANDBY TRUST FUND, into which any payments from the surety will be made. If the surety is required to pay or perform under the terms of the surety bond, the surety would probably seek to recover its expenses from the owner or operator. See Chapter IV for details.

LETTERS OF CREDIT provide assurance of the availability of funds for closure and/or post-closure expenses from a bank or other financial institution. Firms with a good credit history with a financial institution may find this mechanism desirable, since the bank's fee and interest rate are negotiable and are based on the firm's credit-worthiness. Under this arrangement, EPA can direct the deposit of the funds into a STANDBY TRUST FUND, to be used for closure and/or post-closure payments in case of nonpayment or nonperformance by the owner or operator or if the letter were being cancelled without the substitution of alternate assurance. The bank would then require repayment from the owner or operator including an interest charge. The owner or operato- cannot draw upon the letter of credit to finance actual closure and/or post-closure activities (it must use other funds or credit lines to pay for these activities). See Chapter V for details.

INSURANCE assures payment of closure or post-closure expenses whenever needed by an insurance company regardless of the owner or operator's ability to pay these costs. The insurer agrees to reimburse providers of closure and/or post-closure care at the direction of the EPA. PREMIUMS must be paid by the owner or operator. The owner or operator is essentially paying the insurer to assume the liability of providing for closure and/or post-closure expenses up to the FACE AMOUNT of the policy. This may be a desirable option for firms with a good relationship with an insurer, or for use by small firms for which after-tax trust fund payments may be relatively high compared to insurance premiums. This type of insurance should not be confused with liability insurance for sudden and non-sudden events. See Chapter VI for details.

THE FINANCIAL TEST and CORPORATE GUARANTEE provide assurance to EPA that an owner or operator or its PARENT CORPORATION is financially strong enough to be able to pay the estimated costs for closure and/or post-closure care. The specific requirements of two sets of financial test criteria are described in detail in Chapter VII; at least one of these sets of criteria must be met. In general, firms must have adequate NET INCOME, NET WORKING CAPITAL, ASSETS, or NET WORTH relative to the total estimated closure and/or post-closure expenses, or have ready access to capital. A high bond rating may be used to satisfy some of the test criteria. This option will be attractive for many large domestic firms in strong financial condition. The cost to the firm or its parent company will almost certainly be less than the costs of payments to financial institutions under the other alternatives, since the firm is neither building a fund nor paying a (risk) premium.

STATE MECHANISMS are any financial assurance mechanism required or offered by a state government that offers assurance of payment of closure or post-closure care expenses equivalent to the federal RCRA assurance mechanisms. EPA must approve the use of these mechanisms, in whole or part, in satisfaction of federal requirements. Some states have established provisions or funds which assume responsibility for closure and/or post-closure care. While not necessarily relieving the owner or operator from ultimate liability, a state's assumption of responsibility provides assurance to EPA that closure and/or post-closure expenses will be met. Use of these financial assurance options for facilities in states without INTERIM AUTHORIZATION is discussed in Chapter VIII.

2. Using Combinations of Mechanisms and Covering Multiple Facilities

One financial mechanism may be used for both closure and post-closure care of a facility. Owners or operators may also use one or more financial mechanisms to cover multiple facilities, or combine different mechanisms to cover one facility. For example, when coverage must be increased due to inflation or changes in plans, adding a different mechanism could be less expensive or burdensome than increasing the coverage of existing mechanisms. Combinations of mechanisms may be used for: (1) closure only, (2) post-closure only, or (3) closure and post-closure.

Not all mechanisms may be used in combination. Combinations of trust funds, financial gurantee bonds, letters of credit, and insurance are permissible. Firms using the financial test, corporate parent guarantee, or performance bond to provide assurance of closure and/or post-closure care at a facility may not use other financial mechanisms to cover some of the costs of the same facility, even if the cost estimate increases. The financial test, parent guarantee, and performance bond may only be used to cover the entire closure cost estimate and/or post-closure cost estimate of a facility. A single facility could, however, utilize the financial test, corporate guarantee, or performance bond for closure only and one of the other mechanisms for post-closure care, or vice versa.

If an owner or operator wishes to use a trust fund in combination with a financial guarantee bond or letter of credit, it need not establish a separate standby trust fund, since the role of the standby trust fund is fulfilled by the trust fund itself. Similarly, it need only establish one standby trust fund for combinations of financial guarantee bonds and letters of credit.

Owners or operators must submit specific documentation of facilities and amounts covered by each mechanism when assurance is being provided for multiple facilities. If the facilities are located in more than one EPA region, identical evidence of financial assurance must be submitted to the Regional Administrator of each region. In any case, the total financial assurance must equal at least the amount of the total cost estimates. This assists EPA in verifying the adequacy of coverage for each site and coordinating this verification process among regions.

When the Regional Administrator authorizes use of funds for closure or post-closure care of a facility, he may direct payments from any or all mechanisms used in combination to provide coverage for that facility. The choice of which mechanism to draw upon first rests with the Regional Administrator. For example, if a letter of credit and an insurance policy cover a facility, the Regional Administrator may authorize withdrawal from either instrument. In the case of multiple facilities covered by a single mechanism, he may use only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism. For example, if a trust fund covers three facilities and the Regional Administrator must authorize funds for only one, he may continue to draw upon the trust fund only up to the amount stipulated for that facility.

C. QUALIFICATIONS FOR FINANCIAL INSTITUTIONS AND PARENT GUARANTORS

All of the financial assurance mechanisms except the financial test require that a third party assure the payment of closure and post-closure expenses. Exhibit II-3 shows the minimum qualifications for financial institutions acting as trustees, or issuing letters of credit, surety bonds, and insurance policies, and the minimum qualifications for a parent corporation to act as a corporate guarantor.

D. INITIAL SUBMISSIONS

All documents and correspondence to be submitted to the Regional Administrator regarding financial assurance requirements should be marked "Attention: RCRA Financial Requirements" as part of the address.

Use of certified mail is only required when financial institutions or corporate guarantors submit notices of intent to cancel or terminate mechanisms and when the owner or operator or corporate guarantor submit notices of commencement of bankruptcy proceedings.

EXHIBIT II-3

QUALIFICATIONS FOR FINANCIAL INSTITUTIONS
AND PARENT GUARANTORS

INSTITUTION	MECHANISM	QUALIFICATIONS
Banks, savings and loans, other financial institutions	Trust Fund	Authority to act as a trustee; trust operations regulated and examined by a Federal or State Agency
Surety companies	Surety Bond	Listed as an acceptable surety in Circular 570 of the U.S. Department of Treasury and licensed in the state where the surety bond is executed
Banks, savings & loans, mutual savings banks, credit unions	Letters of credit	Authority to issue letters of credit; letter of credit operations regulated and examined by a Federal or State Agency
Insurance companies	Insurance	Licensed to transact the business of insurance in one or more states; or eligible to provide insurance as an excess or surplus lines insurer, in one or more states
Parent Corporation	Corporate Guarantee	Directly own at least 50 percent of the voting stock of the owner or operator; must also satisfy financial test

1. Form and Amount of Financial Assurance

The precise wording required for each mechanism is specified in the regulations. Copies of the required wording for individual mechanisms are included in the later chapters of this manual as Attachments. Both the owner or operator and the financial institution or parent guarantor must assure that the wording of financial mechanisms conforms to the regulations.

The required documents will always include a list or letter identifying the facilities covered. The information must include:

- The facility's EPA Identification Number
- The name and address of the facility
- Identifying information on the financial instrument, if any, including the name and address of the issuing institution, and identification number of the instrument itself.
- Amount of funds for closure or post-closure assured by each mechanism for each facility.

The owner or operator must be sure that the signatories are authorized to act as representatives of the firm in transactions of that type. If the owner or operator is a division of corporation, for example, an officer of the corporation must usually sign on the division's behalf. If the owner or operator is a partnership, the signatory must indicate that he is signing for the partnership (i.e. with words such as "for the partnership" or "for ABC Company"). If the owner or operator is an individual, he may sign himself. In all cases, however, persons having an appropriate POWER OF ATTORNEY may sign on behalf of the owner or operator; a copy of the power of attorney should be attached to the document.

These documents must be in effect by the effective date of the regulations (for facilities under interim status), or before the first receipt of hazardous waste (for new permitted facilities). The owner or operator is responsible for verifying that the accountant, financial institution, assurance mechanism, or corporate parent meets EPA requirements, which are detailed in Chapters III through VIII of this manual.

The amount of the financial assurance must, at a minimum, equal the CURRENT COST ESTIMATES for closure and/or post-closure care. Of course, if multiple mechanisms are used (see Section B of Chapter II), the combined coverage must at least equal the cost estimate. The initial amount of coverage may be larger than the cost estimate in order to accommodate expected revisions in the estimate due to inflation.

The owner or operator is responsible for ensuring that the mechanism(s) cover(s) the entire estimated cost, with one exception. If the trust fund is employed, then a pay-in period is allowed before the trust fund completely covers the closure or post-closure cost estimates.

2. Obtaining Financial Assurance

If an owner or operator decides on a mechanism involving a credit or insurance arrangement (surety bond, letter of credit, insurance policy), the financial institution will request detailed information on the facility and the firm itself. This information may include:

- Historical financial data (balance sheets and profit and loss statements) on the facility and the business entity (corporation, partnership, etc.) owning or operating it;
- Current financial statements (probably the latest interim statements will be required);
- Projected financial information (income statements, cash flows, and balance sheets) reflecting the expected risks and profits associated with the future operation of the facility;
- The closure or post-closure plans and cost estimates;
- A description of the facility, its location, the types and quantities of waste, and other information reflecting the risks involved with the site;
- A description of the business entity owning or operating the facility and its other facilities and lines of business;
- The past operating experience of this facility and others owned or operated by the same business entity; and
- A description of the principal individuals owning and operating the facility, including their qualifications, experience, and financial condition.

Initially, the availability of certain mechanisms (e.g., surety bond, insurance) may be limited in some areas.

E. SUBSEQUENT RESPONSIBILITIES FOR UPDATING AND MAINTAINING COVERAGE

1. Updating Coverage

EPA rules for estimating closure and post-closure costs require that during the operating life of the facility cost estimates be adjusted annually to take account of inflation and that new cost estimates be calculated each time closure or post-closure plans are changed. In either instance, owners or operators may need to increase the amount of financial assurance initially provided.

Adjustment for inflation is calculated using the INFLATION FACTOR derived from the Implicit Price Deflator for Gross National Product as published in the U.S. Department of Commerce Survey of Current Business and in the Economic Indicators published by the Council of Economic Advisors. The inflation factor is calculated by dividing the latest published annual deflator by the deflator for the previous year. Owners or operators may contact local libraries or the appropriate Regional Office to obtain data on deflators and the current inflation factor. The adjustment must be made within 30 days after the anniversary of date on which the initial cost estimate was prepared.

Whenever the CURRENT COST ESTIMATE exceeds the coverage of the financial assurance mechanism(s) because of increases due to inflation or changes in plans, the owner or operator must arrange for increased coverage using the same mechanism or through a combination of mechanisms. The additional coverage must be obtained and evidence of it submitted to the Regional Administrator within 60 days after the cost estimate increase.

If during the operating life of the facility the cost estimate for closure or post-closure should decrease due to a change in operating plans or other factors, the owner or operator may apply to the EPA Regional Administrator for approval of a decrease in coverage. In certain instances, decreases in assurance may be permitted during the post-closure period. Generally, the Regional Administrator will require that the closure or post-closure plans and cost estimates be submitted for review; requests for decreases in coverage will be denied when plans or cost estimates are incomplete or if cost estimates are unreasonably low. Potential effects of inflation will also be a major consideration in evaluating requests for decreases in the amount of post-closure funds assured. See Chapters III through VII for details.

Cost estimates, closure and post-closure plans, and amount of financial assurance may be verified by the Regional Administrator. The latest or latest adjusted closure and post-closure cost estimates must be kept with the latest closure and post-closure plans at the facility.

2. Maintaining Assurance

To maintain assurance, owners or operators are required to make required payments and provide assurance at least equal in amount to current cost estimates. In addition, an owner or operator must also change to an alternate assurance mechanism:

- In the event of bankruptcy of the institution acting as trustee or issuing the letter of credit, surety bond, or insurance contract;
- Whenever the financial institution ceases to qualify under the regulations; and
- If the financial test or corporate guarantee is disallowed.

In the first two of these cases, the owner or operator has 60 days to obtain alternate assurance; in the last, it has 30 days.

In addition, the owner or operator or corporate guarantor must inform the Regional Administrator within 10 days after being named as a debtor in a bankruptcy proceeding.

Finally, if ownership or operating responsibility for the facility is transferred, the Regional Administrator will not permit the previous owner or operator to terminate financial assurance until the new owner or operator has obtained acceptable assurance.

3. Cancellations

Because the financial requirements have been developed to assure the availability of funds for closure or post-closure care, the regulations impose specific requirements on financial institutions or parent guarantors who wish to cancel their RCRA financial mechanisms. An issuer of a surety bond, letter of credit, insurance policy or corporate guarantee must notify both the owner or operator and the Regional Administrator(s) by certified mail of its intent to cancel or terminate the mechanism. Cancellation of a surety bond, insurance contract, or corporate guarantee may not occur during the 120 days beginning with the date of receipt of the notice by both the Regional Administrator and the owner or operator, as evidenced by the return receipts. In the case of the letter of credit, notice must be given at least 120 days before the current expiration date.

In general, the owner or operator is responsible for obtaining alternate assurance if the financial institution or corporate guarantor intends to cancel; however, the chapters on the individual mechanisms will need to be consulted because the obligations and powers of the EPA Regional

Administrator, the owner or operator, and the financial institution or corporate guarantor may differ depending on the mechanism being used.

Of course, the owner or operator may request cancellation or termination of a mechanism when alternate assurance has been substituted or when released from the financial requirements. See Section G below.

4. Changing Mechanisms Voluntarily

Owners or operators may voluntarily change the mechanism being used to provide assurance of financial responsibility with prior written approval from the Regional Administrator. If the mechanism has been providing assurance for facilities in more than one Region, the prior written approval of all the affected Regional Administrators is needed.

To receive approval, the new mechanism must comply with EPA's regulations for eligibility. The new mechanism, if approved, must become effective before or at the time that the previous mechanism expires. The Regional Administrator must ensure continuity of coverage, but should strive for the minimum necessary amount of overlap to reduce the cost to the owner or operator. For example, if an owner or operator changes from a trust fund to another financial assurance mechanism, the Regional Administrator should not direct the trustee to release funds from the trust until the new mechanism is effective.

Changing to a trust fund poses special problems. When an owner or operator cancels other assurance to change to a trust fund, the amount of money deposited into the trust fund must be equal to the amount that would have had to be in the trust fund if the trust had been the original financial assurance mechanism and payments to the trust had been made as specified in the regulations. This is discussed in more detail in Chapter III.

F. DRAWING ON FUNDS

The conditions under which the owner or operator or the Regional Administrator may draw on a financial assurance mechanism will vary with each mechanism. These conditions are described in Chapters III through VII. Regional Administrators may follow a common procedure, however, when authorizing reimbursement of closure or post-closure expenses in certain situations, including the following:

- the owner or operator uses the trust fund mechanism to satisfy financial requirements
- the surety has placed funds in a standby trust
- the Regional Administrator has directed the deposit of funds through a letter of credit into a standby trust

- the owner or operator uses the insurance mechanism to satisfy financial requirements

- the corporate guarantor has placed funds in a trust

In these cases, reimbursement of expenses for closure or post-closure care will be subject to the regulations governing trust funds (See Section C.5 of Chapter III) and insurance (see Section C.5 of Chapter VI). The basic requirements include:

(1) review of itemized bills;

(2) determination within 60 days whether the expenditures are consistent with closure or post-closure plans, or are otherwise justifiable;

(3) approval of requests for reimbursement and direction of payment within 60 days unless there is reason to believe that the cost of closure will be significantly greater than available funds; in that case, complete reimbursement should be withheld until certification of proper closure is completed;

(4) approval of requests for reimbursement of post-closure expenditures, if determined to be justifiable.

When assessing itemized bills submitted by owners or operators, the Regional Administrator will need to decide if any extra expenditures, such as the costs of responding a contingency not accounted for by the plan (bad weather, liner failure, etc.) should be reimbursed by the trust or paid by the owner or operator. Separate payment required of a financially troubled owner or operator may cause it to go into bankruptcy. In this case, EPA might be left responsible for completion of closure or post-closure care of the facility. On the other hand, if the Regional Administrator agrees to reimbursement, there is the possibility that the trust fund will run out of funds before the completion of these activities. This dilemma will have to be solved by the Regional Administrator on a case-by-case basis, in consultation with Headquarters. The owner or operator, of course, remains responsible for all closure and/or post-closure costs even if the financial assurance monies are exhausted.

G. RELEASE FROM RCRA FINANCIAL REQUIREMENTS

An owner or operator of a hazardous waste facility is released by the Regional Administrator (1) from the closure financial assurance requirements when it satisfactorily certifies to EPA that closure has been completed in accordance with the closure plan and (2) from the post-closure financial assurance requirements when the post-closure care requirements have been completed in accordance with the post-closure plan. The certification of

closure must be provided by the owner or operator and by an independent registered professional engineer.

In the case of financial assurance for closure, the Regional Administrator will determine whether closure is satisfactory, and notify the owner or operator within 60 days of receiving the certifications. For release from post-closure assurance requirements, the Regional Administrator will approve release at the end of the post-closure period specified in the post-closure plan, upon request of the owner or operator, if post-closure care has been satisfactorily provided in conformity with the plan.

Additionally, an owner or operator may be released from the federal RCRA requirements if (1) the administration of the hazardous waste program is taken over by an authorized state government or (2) ownership or operation of the facility has been transferred, but only in accordance with the specific conditions of such transfers. There should be no lapse in coverage allowed in such circumstances.

H. DIFFERENCES BETWEEN REQUIREMENTS FOR INTERIM STATUS AND PERMITTED FACILITIES

This manual contains guidance for both interim status and permitted facilities. Interim status facilities are existing facilities who have submitted notifications and Part A's and are awaiting final disposition of permit applications. A permitted facility is one which has demonstrated compliance with RCRA standards and has received a permit.

The guidance in this manual primarily addresses the financial responsibility requirements for interim status facilities. The additional requirements for permitted facilities are included in the chapters on the mechanisms. It is useful to remember that there are only four differences between interim status and permitted facility financial assurance requirements:

(1) While financial assurance mechanisms for interim status facilities must generally be in force by the effective date of the regulations, new permitted facilities must provide assurance before the first receipt of hazardous waste at the facility.

(2) The "pay-in" period for trust funds is defined differently for permitted and interim status facilities. The pay-in period is 20 years (interim status) or the life of the initial RCRA permit (permitted facilities) or the remaining life of the facility (both interim status and permitted facilities), whichever is shorter. (See Chapter III)

(3) The receipt from the trustee for the initial payment into the trust fund must be submitted by the owner or operator to the Regional Administrator before the first receipt of hazardous waste at a new permitted facility. Interim status facilities need not submit a receipt. (See Chapter III)

(4) Performance bonds are not a permissible form of surety bond for interim status facilities under the regulations, but are permissible for permitted facilities. (See Chapter IV)

I. USE OF THE HAZARDOUS WASTE DATA MANAGEMENT SYSTEM

The Hazardous Waste Data Management System (HWDMS) is being developed to aid Regional Office staff in tracking enforcement activities, compliance monitoring, and the status of permits. The HWDMS could prove particularly valuable for management of the financial assurance programs in at least four ways, outlined below.

(1) Recordkeeping. The HWDMS will have at a minimum a list of EPA facilities in the region, indexed by name and by EPA Identification Number. Each facility must have the following financial assurance information in its file:

- Type of instrument or guarantee
- Name and address of issuer or guarantor
- Amount of closure or post-closure costs currently covered by instrument (both in dollars and as a percentage of total costs)

This information will enable Regional Office staff to identify the facilities for which financial assurance has not been provided, as well as the adequacy of the funds assured. In addition, the HWDMS can be used to track other pieces of information such as:

- Number of instrument
- Effective date of instrument
- Date of expiration of instrument
- If multifacility instrument, name and number of other facilities in Region, name and number of facilities outside Region
- Authorized payments made from instrument

- Total closure and post-closure cost estimates
- Narrative comments

A detailed, computerized recordkeeping function could reduce clerical requirements and speed access to critical information.

(2) "Tickler" File. The RCRA financial assurance regulations specify different timetables and deadlines that the Regional Administrator must follow. The HWDMS could ease this burden considerably by automatically tracking critical dates of submission, notifications, etc. and providing computer readouts of facilities or owners and operators that require attention. For example, the printouts of critical dates and required actions could be ordered for a given owner, operator, or facilities. Alternatively, the printouts could be weekly updates of actions required from all facilities, owners, operators, or financial institutions within the next 30 days.

Two levels of tickler files could be established, one for regularly scheduled events, and one for unscheduled events:

(A) Scheduled events such as expiration dates of financial instruments and inflation adjustment dates could be programmed into the file on the date of submission, and at known intervals after submission.

(B) Unscheduled events such as increases in cost due to operating plan changes, cancellation notices, owner or operator bankruptcies, and issuer disqualifications can be programmed in the file when notification is received.

The HWDMS can be particularly useful in tracking the adequacy of financial assurance with respect to annual adjustments in cost estimates due to inflation.

(3) Financial Test and Corporate Guarantee. The Regional staff could develop a filing system of data taken from the chief financial officer's letter and auditor's opinion (see Exhibit VII-4 for an example of such a file). If this filing system were automated, a simple computer program could screen trends in the financial data and "red flag" any owner, operator or corporate parent that appears to be deteriorating.

(4) Trust Fund Payment Calculations. The Regional Administrator could develop an audit system to ensure that the required payments are being made to the trust fund, as explained in Chapter III. The calculation of the required payments could become complex if multi-instrument or multi-facility financial assurance mechanisms are employed. Automating these calculations would result in a fast, error-free audit process.

Undoubtedly, other applications of the HWDMS to managing financial assurance programs could be developed. However, detailed discussion of the HWDMS is outside the scope of this manual.

ATTACHMENT II-1

SUMMARY OF OWNER OR OPERATOR RESPONSIBILITIES*

(1) Be certain that the financial assurance mechanism:

(a) Is worded as required;
(b) Is in the proper amount;
(c) Is signed as required;
Is issued by a qualifying institution;
(d) Is in effect at the appropriate time; and
(e) Is submitted to the Regional Office on time.

(2) Increase the amount of assurance when necessary during the operating life of the facility due to:

(a) Annual adjustments for inflation; and
(b) Changes in plans and increases in cost estimates
Submit evidence of increase in coverage within 60 days.

(3) Apply for decreases in the amount of assurance when appropriate.

(4) Obtain new assurance:

(a) When the financial institution enters bankruptcy, ceases operations, or ceases to qualify; or

(b) When the financial institution notifies its intent to cancel the assurance.

(5) Notify the Regional Administrator by certified mail within 10 days after the commencement of a bankruptcy proceeding.

(6) Request termination of financial assurance when alternate assurance is provided or when released from financial assurance requirements.

(7) Submit itemized bills for reimbursement for closure and post-closure care.

(8) Request release from financial assurance requirements when final closure is properly completed and again when post-closure care is completed.

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* NOTE: Responsibilities and rights may vary with the specific financial assurance mechanism used. For details, consult Chapters III through VIII of this manual.

ATTACHMENT II-2

SUMMARY OF REGIONAL OFFICE RESPONSIBILITIES*

(1) Check the qualifications of the financial institution, etc.

(2) Verify that the financial assurance mechanism:

(a) Is correctly worded;
(b) Is in the proper amount;
(c) Is complete;
(d) Is signed as required; and
(e) Is in effect and submitted to the Regional Office on time.

(3) Make sure that the amount of financial assurance is increased when necessary during the operating life of the facility due to:

(a) Annual adjustments for inflation, and
(b) Changes in plans and increases in cost estimates

(4) Allow decreases in the amount of financial assurance only when cost estimates decrease and the amount of assurance will be adequate.

(5) Verify that new assurance is obtained:

(a) When the financial institution enters bankruptcy or ceases operations;

(b) When the financial institution or parent guarantor ceases to qualify; or

(c) When the owner or operator requests termination of assurance because a new mechanism is being used or ownership or operating responsibility is being transferred.

(6) Approve requests for a change in mechanisms when no lapse in coverage will result.

(7) When the financial institution or parent guarantor sends notice of cancellation, ensure that alternate assurance is provided or the financial mechanism is used to fund closure and/or post-closure care.

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* NOTE: Responsibilities and rights may vary with the specific financial assurance mechanism used. For details, consult Chapters III through VIII of this manual.

ATTACHMENT II-2 (continued)

SUMMARY OF REGIONAL OFFICE RESPONSIBILITIES*

(8) Approve requests for reimbursement for closure and/or post-closure expenses only when itemized bills are submitted and the expenses are in accordance with the plan or otherwise justified. Instruct the insurer or trustee in writing to make reimbursement in the specified amounts. If closure costs will significantly exceed the value of a trust fund or remaining insurance, withhold a portion of reimbursement until completion of closure.

(9) Permit release from financial assurance requirements only when closure and/or post-closure care is properly completed.

(10) Approve requests to terminate financial assurance:

(a) When alternate assurance is substituted; or

(b) When the owner or operator is released from financial assurance requirements.

(11) Record relevant information in HWDMS and monitor deadlines for submissions

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* NOTE: Responsibilities and rights may vary with the specific financial assurance mechanism used. For details, consult Chapters III through VIII of this manual.

III. ESTABLISHING FINANCIAL RESPONSIBILITY USING TRUST FUNDS

A. INTRODUCTION

This chapter describes how owners or operators can fulfill their RCRA financial requirements through TRUST FUNDS. A TRUST is a three-party agreement whereby one party, called the GRANTOR (sometimes also called the TRUSTOR), transfers some assets (often money) to a second party, called the TRUSTEE, to hold on behalf of a third party, called the BENEFICIARY. In a RCRA trust fund, the owner or operator is the grantor, a bank or other entity that fulfills the RCRA requirements is the trustee, and EPA is the beneficiary. The owner or operator, as grantor, pays into the trust fund which is held in trust by the trustee. The fund is used to pay for closure and/or post-closure care. The entire arrangement is governed by a TRUST AGREEMENT that sets out the responsibilities and rights of each party.

The trustee is empowered to invest the trust funds during the existence of the trust. The investments which the trustee may make are limited by the RCRA regulations (see Exhibit III-1 below) and sometimes by state law. Any investment income accrues to the trust, and reduces the required payments into it by the owner or operator. Of course, the return on the truste's assets will vary depending on the investments made. The owner or operator usually pays a fee for the trust services provided.

The regulations pertaining to RCRA trust funds are as follows:

EXHIBIT III-1

RCRA TRUST FUND REGULATIONS

Topic	Interim Status	Permitted Facilities
Closure trust	40 CFR §265.143(a)	40 CFR §264.143(a)
Post-closure trust	40 CFR §265.145(a)	40 CFR §264.145(a)
Wording of Trust Agreement	40 CFR §264.151(a)	40 CFR §264.151(a)

Source: Title 40, Code of Federal Regulations (CFR).

B. RCRA TRUST FUND REQUIREMENTS

This section describes both the features of RCRA trust funds themselves and the responsibilities of owners and operators using trust funds to demonstrate financial assurance. A checklist of these responsibilities appears in Attachment III-1 at the end of this chapter.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications for Trustee. The first step that an owner or operator considering using a trust fund must take is to locate a qualified entity willing to act as trustee. EPA requires that the trustee be an entity that has the authority to act as trustee and whose trust operations are regulated and examined by a federal or state agency. If the owner or operator has any doubt about whether the entity is empowered to act as a trustee, he should ask the entity what authority regulates it and then contact the authority to determine whether the entity has the power to act as trustee. Exhibit III-2 at the end of this chapter indicates the primary regulatory authority for different types of financial institutions. Appendix A-2 lists relevant federal agencies; Appendix B includes a list of relevant state agencies.

2. Wording and Amount of Assurance. Several particular aspects of the trust agreement merit special attention:

First, the trust is irrevocable; it cannot be changed or terminated by the owner or operator except with written agreement of the trustee and the Regional Administrator.

Second, unlike the surety bond, letter of credit, insurance contract, or corporate guarantee, the trust agreement does not assure that the total amount (i.e., the current cost estimate) for closure or post-closure will be made available at any time; the trustee need only provide the amount of funds that has accumulated in the trust as of the time of closure. (See Section 4 of the Trust Agreement form, Attachment III-3.) Generally, annual payments will be made into the fund based on the formula discussed in Section B, Part 5 below. Payments into the trust are based on a formula which should ensure that the total amount needed will be available at the end of the planned PAY-IN PERIOD. (See Attachment III-4 which shows how initial payments are calculated.) The owner or operator may, however, choose to make payments to the fund at an accelerated rate or deposit the full amount of the cost estimates at the time the fund is established. The owner or operator remains responsible at all times for the full amount of closure and post-closure expenses even if--due to early closure, for example--the trust fund has not accumulated sufficiently to reimburse the owner or operator for all required expenses.

Finally, the text of the trust agreement itself does not identify the facilities covered by the trust fund or the current cost estimates for these facilities. The facilities and cost estimates are listed on a separate

EXHIBIT III-2

RCRA TRUST FUND: REGULATORY AUTHORITIES FOR FINANCIAL INSTITUTIONS

Type of Financial Institution	Primary Regulatory Authority	Whom to Call
1. State-Chartered Financial Institutions, Including Commercial Banks, Savings and Loans, Mutual Savings Banks, Credit Unions, State Licensed Foreign Banks	State Authority	See Appendix B
2. Nationally-Chartered Commercial Banks, Nationally-Licensed Foreign Banks, all Washington, D.C. commercial banks	Comptroller of the Currency	Trust Division (202) 447-1731
3. Nationally-Chartered Savings and Loans	Federal Home Loan Bank Board	General Counsel, (202) 377-6000
4. Nationally-Chartered Mutual Savings Banks	Federal Home Loan Bank Board, State Authorities	As Number 3, and see Appendix B
5. Nationally-Chartered Credit Unions	National Credit Union Administration	General Counsel, (202) 357-1030

Schedule A. This Schedule A must be updated within 60 days after each change in cost estimates, either because of adjustments due to inflation or because new closure and/or post-closure plans or cost estimates have been prepared.

Attachment III-3 contains the required wording for RCRA trust agreements. The trust agreement must be signed by both the owner or operator and the trustee. These signatures certify that the wording of the trust agreement is identical to the wording in the regulations. Attachment III-3 also provides samples of Schedule A (identification of facilities and cost estimates) and Schedule B (property used to establish trust fund).

The agreement must be properly "ACKNOWLEDGED." An ACKNOWLEDGMENT is a formal declaration by persons entering into an agreement that they affirm their obligations created in the agreement and are acting of their own free will. See Attachment III-3 for an example. The requirements for acknowledgments differ from state to state.

3. Establishing a Trust Fund. The wording of the agreement itself is specified in the regulations, but the trustee will be able to tell the owner or operator (1) the fees to be paid for its trust services, (2) the investment strategy it plans to follow, and (3) whether the trust could qualify to be invested together with other funds in a COMMON TRUST. Each of these topics receives further discussion here.

(a) Fees and Taxes - Trustee's fees can be expected to vary depending on the specific institution chosen, the amount of funds held in trust, the extent to which the owner or operator uses other services of the institution, and the extent and type of investment activity and trustee involvement. The owner or operator should not only find out what fees the institution itself will charge, but also the other applicable fees and charges, including brokerage fees, legal fees (such as those for setting up the trust), accounting fees, and provisions for local, state, and federal income taxes. There is currently no provision in the U.S. Internal Revenue Code that allows payments into the fund to be deducted from taxable income or allows trust income to be exempt from taxation. EPA has asked the Internal Revenue Service to render an opinion on the tax aspects of RCRA trust funds. Owners or operators may want to request private rulings on this matter from the Internal Revenue Service under Revenue Procedure 80-20.

(b) Investment Strategy - Money held in a RCRA trust fund must be invested by the trustee in accordance with the general investment policies and guidelines of the owner or operator and subject to the conditions listed in the trust agreement. Trustees have reasonably broad discretion in investing trust funds, but they are held to a legal standard called the "PRUDENT MAN" STANDARD. This standard is stated in the trust agreement as requiring the discharge of duties "with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims" (Section 6). EPA has,

however, provided several exceptions to the usual interpretation of this standard. The reasons for these exceptions are discussed in the Background Document cited in Exhibit I-5 in Chapter I.

First, the trust agreement forbids the trustee to invest in SECURITIES OR OTHER OBLIGATIONS of the grantor, or any other owner or operator of the facilities for which the trust fund is established, or any of their affiliates as defined in Section 6(i) of the Trust Agreement. Thus, even if the grantor is owned by a very large, stable corporation that would be a sound, prudent investment, the trust agreement specifically prohibits the trustee from investing trust funds in the grantor's parent. This prohibition does not apply, however, to securities or other obligations of the federal government or state governments. Even if the federal government or a state government owns a facility or the land on which it is situated, the trustee for the operator may invest in federal or state securities or other obligations.

The second exception to the prudent man standard contained in the trust agreement applies to the usual rule requiring the trustee to keep trust property segregated from the trustee's own funds and from other funds. The trustee is allowed to invest in time or demand deposits of the trustee institution, up to the amount insured by law. The trustee is also permitted to put trust fund assets into any appropriate "common, commingled, or collective trust fund created by the Trustee," in other words, a common trust.

The third and final exemption to the prudent man standard is that the trustee can hold cash for a reasonable period of time while awaiting investment or distribution and is not liable for paying interest on that cash.

It should be noted that individual states may impose stricter requirements than the federal regulations concerning the investments in which trust funds may be placed. Owners or operators will want to make sure that the trustee is aware of any state requirements concerning hazardous waste site trust funds.

(c) Common Trust Funds - Finally, the owner or operator should determine whether the trustee plans to invest the trust in a common trust fund. Common-trust funds pool a number of trust accounts and invest them for potentially higher yields and at sometimes decreased fees and costs because of the increase in investment size. Since smaller trusts can often benefit from common trust funds, common trusts may make the trust-fund mechanism of financial assurance more attractive to owners or operators with small financial assurance needs. Not every financial institution will offer such a trust fund due to the requirements of other federal and state agencies such as the Securities and Exchange Commission. The trustee need not establish a special common trust for RCRA trust funds, but any common trust in which RCRA trust funds participate would have to fulfill all the requirements of the trust agreement.

4. Submission of Documents to EPA. The owner or operator is required to submit the following documents to the EPA Regional Administrator:

- An ORIGINALLY SIGNED DUPLICATE of the trust agreement;
- A formal certification of acknowledgement.

The trust agreement must be effective, the first payment into the trust fund made, and an originally signed duplicate of the agreement delivered to the Regional Administrator, all by the effective date of the regulations for interim status facilities.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

5. Updating the Trust Fund. The owner or operator generally must make annual payments into the trust fund. The trust agreement provides that, during the "PAY-IN PERIOD," the trustee must notify the Regional Administrator (by certified mail, within 10 days) if the owner or operator fails to make an annual payment into the trust fund within 30 days after the anniversary date of the first payment. The pay-in period is defined as 20 years or the remaining operating life of the facility as estimated in the closure plan, whichever is shorter. The amount of the payments is determined by the closure and/or post-closure cost estimates, the amount already in the trust fund, and the pay-in period. As already mentioned, the first payment must be made by the effective date of the regulations.

The formula for computing the amount of payment is:

$$\frac{CE - CV}{Y}$$

where
CE is the current closure cost estimate and/or the current post-closure cost estimate,
CV equals the current value of the trust fund, and
Y equals the number of years remaining in the pay-in period.

Each year, at least 30 days prior to the anniversary date of the establishment of the trust fund, the trustee must value the assets in the trust fund and send a statement of the valuation, detailing the results of investment activity and the expenses levied against the fund, to the owner or operator and the Regional Administrator. Securities in the trust fund must be valued at their market value no more than 60 days prior to the anniversary date of the fund.

The owner or operator may object, in writing, to the trustee's investment activities or to expenses levied against the trust fund within 90 days of receiving the valuation statement. Despite any objections, the owner or

operator is obliged to make the required payments into the fund by the appointed dates. EPA may object to any of the trustee's activities at any time.

As mentioned previously, owners or operators may elect to make payments into the trust fund at an accelerated rate or to deposit the full amount of the cost estimates at the time the fund is established. The trustee must still, however, value the fund annually and provide a statement to the grantor and Regional Administrator confirming the value of the fund. The owner or operator must maintain the value of the trust fund at no less than if payments had been made according to the formula described above.

If the operating life of the facility extends beyond the original pay-in period, the owner or operator continues to remain responsible for ensuring that the value of the trust fund equals or exceeds the current cost estimate. Thus, whenever the cost estimate changes and becomes greater than the most recent annual valuation of the trust fund, an additional deposit must be made into the trust fund or alternative financial assurance obtained within 60 days. The Trustee is not required to send the Regional Administrator a notice of non-payment if the owner or operator fails to make a payment after the pay-in period is completed, however.

During the operating life of the facility, the Regional Administrator may approve a request by the owner or operator for release of funds from the trust fund if the current value of the trust fund (according to the trustee's most recent statement of value) exceeds the total of the applicable cost estimates. Similarly, during the period of post-closure care, the Regional Administrator may approve a release of funds if the owner or operator can demonstrate that the value of the trust fund exceeds the remaining cost of post-closure care. Such situations might occur if the owner or operator had made deposits higher than those required by these regulations, inflation was lower than expected,[1] investment earnings were higher than expected, or a change in closure and/or post-closure plans lowered the cost estimates.

6. Maintaining Assurance. The owner or operator is responsible for ensuring continuous compliance with the financial assurance regulations. Specifically, if the trustee institution enters bankruptcy, ceases operations, or loses its authority to act as a trustee, it no longer qualifies to act as a RCRA trustee. Arrangements for a new trustee or other financial assurance must be made by the owner or operator within 60 days after such an event.

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[1]During the period of post-closure care, the post-closure cost estimates will not be adjusted for inflation, but lower inflation may affect the value of the trust fund or the cost of the remaining post-closure care.

If the owner or operator sells or transfers operating responsibility for the facility for which the trust fund provides financial assurance, the trust fund will not automatically transfer to the next owner or operator. Instead, the new owner or operator will have to provide new financial assurance for the facility. Of course, the new owner or operator can enter into an agreement with the old owner or operator by which the trust fund is transferred to the new owner or operator. This will require amendments to the trust agreement which must be approved by the trustee and the Regional Administrator. The Regional Administrator will not allow a trustee to release funds from a trust fund to an owner or operator until the new owner or operator meets the applicable financial responsibility requirements and the facility is in interim status or is issued a permit.

Finally, the owner or operator may substitute an alternate mechanism of financial assurance so long as there is no lapse in coverage. See Section E.4 of Chapter II.

7. Role of Trustee. The Trustee will usually prepare the trust agreement, Schedule A (according to the instructions of the owner or operator), Schedule B, and the certificate of acknowledgment. The trustee has control over the trust, can sue to protect it, and is responsible for its preservation. The trustee is responsible for annual valuations of the trust, for notifying the Regional Administrator if the owner or operator fails to make an annual payment, and for making payments out of the trust fund at the direction of the Regional Administrator. The trustee is responsible for errors in administering the trust resulting from not acting in good faith (e.g., willful negligence, gross misconduct, and violation of the prudent man standard).

A change in trustees does not affect the existence of the trust itself. The trustee may be changed if the owner or operator is dissatisfied with the performance of the trustee or if the trustee resigns; the trustee must be changed if the trustee institution enters bankruptcy or ceases to meet the qualifications. In either case, the trustee can be changed only upon agreement by the owner or operator, the trustee, and the Regional Administrator. The present trustee may not unreasonably withhold its permission to change trustees.[2] The successor trustee must be appointed by the owner or operator. If the owner or operator fails to do so, a trustee wishing to resign may request a court to appoint a successor trustee. The present trustee remains responsible until it has been replaced.

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[2]See the discussion in Section B.2 of Chapter VI concerning when refusal to consent to an assignment of a RCRA insurance contract would be "unreasonable."

8. Drawing on the Trust Fund. After the beginning of final closure, the owner or operator may request reimbursement for closure expenditures by submitting itemized bills to the Regional Administrator. Similarly, bills for post-closure care may also be submitted for reimbursement. Within 60 days after receiving the bills, the Regional Administrator will instruct the trustee to make reimbursements, if the expenditures are in accordance with the closure or post-closure plan or are otherwise justifiable. The Regional Administrator will exercise judgment in determining what expenses are justifiable. Where the cost of closure appears to be significantly greater than the value of the trust fund, the Regional Administrator is empowered to withhold reimbursement from the trust fund until he has received satisfactory certification of completion of closure. See Section G of Chapter II.

The owner or operator remains responsible for all closure or post-closure costs and for the performance of closure and post-closure care, even if the funds available through the trust fund are exhausted.

9. Termination of the Trust Fund. The owner or operator should request the approval of the Regional Administrator to terminate the trust fund in two situations: (1) when alternate financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when released from applicable RCRA financial requirements (see Section G of Chapter II). Upon receiving the Regional Administrator's written consent, the owner or operator should forward a copy of it to the trustee institution. The trust fund can only be terminated with the written consent of the Regional Administrator. The owner or operator should request the Regional Administrator to instruct the trustee to terminate the trust and to forward the remaining funds (after subtraction of fees and expenses) to the owner or operator. The owner or operator will also have to instruct the trustee to terminate the trust.

PERMITTED FACILITIES

Permitted facilities are subject to trust fund rules almost identical to those covering interim status. The major difference is in computing the amount of required annual payments. The formula (CE-CV)/Y is still used and CE is still the relevant current cost estimate, CV is still the current value of the trust fund, and Y is still the number of years remaining in the pay-in period. The pay-in period is defined differently, however. For permitted facilities, it is the term of the initial RCRA permit or the remaining operating life of the facility as estimated in the closure plan, whichever is shorter. Facilities that obtain permits after being in interim status will become subject to this permitted facility pay-in period; see example 4 in Attachment III-4. The formula will take into account payments made into the trust fund while the facility was in interim status. For new permitted facilities, this same permitted facility pay-in period applies.

The only other differences from interim status standards are (1) the trust agreement must be submitted to the Regional Administrator at least 60 days before waste is first received at the facility; (2) the initial payment into

the trust fund must be made before hazardous waste is first received at the facility; and (3) a receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator before the initial receipt of hazardous waste.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the duties of the Regional Office in reviewing trust funds for RCRA financial assurance and ensuring satisfaction of requirements. A summary checklist appears in Attachment III-2 at the end of this chapter.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Trustee. The first step that EPA Regional Office staff must take is to ensure that the trustee is qualified. The easiest way to do this may be to maintain a current list of the qualified entities in the region. This list can be initially compiled by simply checking the qualifications of each trustee as trust agreements are submitted and compiling a list of the trustees that qualify. Additions can be made to this list as qualified entities are checked during the review of submissions. Necessary deletions from this list--because entities fail to continue to qualify--can be discovered by regular contact with the regulatory agencies listed in Exhibit III-3 and Appendix B.

2. Conformity to Other Requirements. The Regional Administrator will want to make certain that the following additional tasks have been accomplished by the appropriate dates:

- An originally signed duplicate of the trust agreement, including Schedules A and B, is submitted to the Regional Administrator;
- The trust agreement is signed by the owner or operator and the trustee and is properly acknowledged;
- The amount of coverage is adequate; and
- The first payment is made.

For facilities with interim status, all of this must be done by the effective date of the regulations. For new permitted facilities, the initial payment must be made and a receipt for this payment submitted to the Regional Administrator before hazardous waste is first received. The trust agreement itself must be submitted to the Regional Administrator 60 days before that date.

The wording of the trust agreement in all cases must be identical to that in the regulations; Regional Offices should proofread the wording of trust agreements to ensure conformity to requirements. The required wording of the

trust agreement and examples of supporting documentation are given in Attachment III-3 at the end of this chapter.

3. Recordkeeping and Tracking Systems. As trust fund agreements are received, relevant information should be recorded including the name, address, and EPA Identification Number of the covered facilities; the name of the financial institution; amount of coverage for each facility and the effective date; and information verification procedures performed. Automatic data processing systems can be used for this. A list of trust funds in effect should be kept not only under the owner or operator's name, but also under the name of each financial institution so that, in case of bankruptcy or ineligibility or other reasons, it will be easy to determine which owners or operators need to obtain financial assurance elsewhere. This sytem can be used to keep track of mergers and changes in the names of financial institutions.

SUBSEQUENT RESPONSIBILITIES

4. Updating the Trust Fund. An important responsibility for the Regional Administrator will be to ensure that annual payments to the trust fund are being made during the pay-in period in the proper amount, no later than 30 days after each anniversary date of the first payment. There are three reasons for this: (1) the owner or operator is not required to submit receipts for annual payments into the fund; (2) the trustee must notify the Regional Administrator only of the failure of the owner or operator to make annual payments (i.e., an absence of a payment), not a payment that is too small; and (3) the trustee need not report failure to make payments due to increases in cost estimates after the pay-in period is completed. Therefore, the Regional Administrator will have to keep track of notifications of failures to make the required payments and to spot check (audit) those trust fund payments that have been made. To do such an audit, the Regional Administrator should:

(1) Obtain the closure plan and the current closure and post-closure cost estimates from the facility;

(2) Compute the value of each of the variables in the payment formula, (CE-CV)/Y, by using the plans, the cost estimates, and the most recent trust fund valuation;

(3) Determine the required payment from the formula; and

(4) Contact the trustee to find out if the amount the trustee actually received from the owner or operator was at least as great as the required payment. Note, however, that the trustee is not required to divulge this information and may be unwilling to do so.

Since the trustee is only required to send notice of non-payment during the pay-in period, the Regional Administrator may wish to notify trustees when the pay-in period is completed. After completion of the pay-in period, the owner or operator must still make additional deposits into the trust fund or obtain alternative financial assurance within 60 days after any change in the current cost estimates that makes the current cost estimates exceed the value of the trust. The Regional Administrator must ensure that these payments are made or alternative assurance obtained. Spot-checking may again be required.

As with any financial assurance mechanism, the closure and post-closure estimates will be adjusted annually for inflation and new estimates will be prepared when closure and/or post-closure plans are changed. Unlike most of the other mechanisms, however, the amount of assurance (the amount in the trust) will fluctuate depending upon the payments made into the trust and the investments made by the trustee. Thus, it may happen that the value of the trust exceeds the current cost estimates and the owner or operator will request the Regional Administrator to have the excees returned to him. The Regional Administrator must act on such requests within 60 days after receiving them. They should be granted and the trustee instructed to release the appropriate amount of funds after the Regional Administrator has checked that the current value of the trust exceeds the current cost estimates.

5. Maintaining the Trust Fund. The Regional Administrator will also be called upon to approve changes in trustees. Authorizing new trustees is a simple matter; the only requirement is that the new trustee be qualified.

The Regional Administrator will also want to check that existing trustees continue to remain qualified and do not enter bankruptcy. This, too, is not difficult since the financial status of qualified trustees can be checked regularly. A list of the trustees holding RCRA trusts should be kept on the HWDMS, not only under the owner or operator's name, but also under the trustee's name. This will make it easy to determine which owners or operators need to obtain alternate assurance when a trustee ceases to qualify or enters bankruptcy.

6. Drawing on the Trust Fund. A more difficult situation exists when release of funds is being requested as reimbursement for closure or post-closure expenses. Owners or operators may begin submitting requests for reimbursement of final closure expenses even while closure activities continue; they need not wait until closure is complete. For reimbursement, the Regional Administrator must insist upon itemized bills (as the regulations provide) and stay abreast of closure activities and how much remains in the trust fund. For both closure and post-closure care expenses, the Regional Administrator should only authorize reimbursement when the expenditures were in accordance with the plan or otherwise justifiable, but not even all expenses properly incurred should be reimbursed when requested. The regulations permit the Regional Administrator to withhold reimbursement until closure is completed if there is reason to believe that the cost of closure will significantly exceed the value of the trust fund. This allows financial

assurance to be maintained until completion of closure and can give an incentive to the owner or operator to complete closure. See Section G of Chapter II for further discussion. Withholding of reimbursement is not permitted for post-closure care expenses. Of course, the owner or operator remains responsible for all closure and/or post-closure costs even if the fund is exhausted.

The Regional Administrator must act on requests for release of funds discussed in this section within 60 days after receipt of the request for reimbursement.

7. Requests to Terminate the Trust Fund - The Regional Administrator may consent to the termination of the trust fund only (1) if alternate assurance is substituted (see Section E.4 of Chapter II) or (2) if the owner or operator is released from applicable RCRA financial requirements (see Section G of Chapter II). Consent must be in writing and may accompany the Regional Administrator's letter releasing the owner or operator from closure or post-closure financial assurance requirements. The Regional Administrator should instruct the trustee to terminate the trust and to forward the remaining funds (after subtraction of fees and expenses) to the owner or operator.

PERMITTED FACILITIES

There are two major areas in which interim status and permitted facilities differ: (1) the definition of the pay-in period and (2) the dates by which the first payment must be made into the trust fund and the trust agreement submitted to the Regional Administrator.

In calculating the required payments into the trust fund, the pay-in period for permitted facilities is the shorter of the term of the initial RCRA permit or the remaining operating life of the facility as estimated in the closure plan.

For new permitted facilities, the initial payment must be made and a receipt for this payment submitted to the Regional Administrator before hazardous waste is first received. The trust agreement itself must be submitted to the Regional Administrator 60 days before that date.

D. SOURCES OF FURTHER INFORMATION

Exhibit III-2 lists the regulatory authorities to contact if there is any doubt that a financial institution qualifies to be trustee of a RCRA trust. A copy of the regulations (see Exhibit III-1 above) themselves may be obtained from EPA Regional Administrators. Owners or operators are also encouraged to contact their state hazardous waste agencies to determine whether the state imposes any restrictions on trust funds as a means of establishing financial responsibility for hazardous waste facilities. (See Appendix B.)

National trade associations can supply information about financial institutions in general. Major national organizations include:

1. American Bankers Association
   1120 Connecticut Avenue, N.W.
   Washington, D.C. 20036
   (202) 467-4000
   Trade association of banks and trust companies.

2. Independent Bankers Association of America
   P.O. Box 267
   Sauk Centre, Minnesota 56378
   (612) 352-6546
   Association of medium size and smaller independent banks.

3. National Association of Mutual Savings Banks
   200 Park Avenue
   New York, New York 10017
   (212) 973-5432
   Trade assocition of mutual savings banks.

4. United States League of Savings Associations
   111 East Wacker Driver
   Chicago, Illinois 60601
   (312) 644-3100
   Trade association of savings and loan associations, cooperative banks, and state and local savings and loan association leagues.

5. Credit Union National Association
   5710 Mineral Point Road
   Box 431
   Madison, Wisconsin 53701
   (608) 231-4000
   Trade association of state credit union leagues.

6. Conference of State Bank Supervisors
   1015 Eighteenth Street, N.W., Suite 606
   Washington, D.C. 20036
   (202) 296-2840
   Organization of state officials responsible for the supervision of state-chartered banking institutions.

7. National Association of State Credit Union Supervisors
   1499 Chain Bridge Road, Suite 201
   McClean, Virginia 22101
   (703) 821-2243
   Organization of state credit union supervisors and state-chartered credit unions.

8. National Association of State Savings and Loan Supervisors
   1001 Connecticut Avenue, N.W., Suite 800
   Washington, D.C. 20036
   (202) 452-1523
   Organization of state savings and loan supervisors.

ATTACHMENT III-1

RCRA TRUST FUND CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
(1)	___	Locate a financial entity willing to act as trustee that has the authority to act as trustee and is regulated and examined by a federal or state agency.
(2)	___	Make certain that the wording of the agreement is identical to the wording in the regulations (See Attachment III-3), that properly completed Schedules A and B are attached, and that the agreement is acknowledged in accordance with state requirements.
"	___	Attach Schedule A to the trust agreement listing the facilities and cost estimates covered by the trust fund and update Schedule A within 60 days after each change in cost estimates.
(3)	___	Discuss with the prospective trustee: (a) fees and taxes, (b) investment strategy, and (c) any common trust funds for which the trust fund qualifies.
(4)	___	For interim status facilities, by the effective date of the regulations, make the first payment into the trust fund and submit an originally signed duplicate of the trust agreement, including Schedules A and B and a certification of acknowledgment to the Regional Administrator.
"	___	For new permitted facilities: (1) the trust agreement must be submitted to the Regional Administrator at least 60 days before hazardous waste is first received at the facility; (2) the initial payment into the trust fund must be made before hazardous waste is first received at the facility; and (3) a receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator by this date.
(5)	___	During the pay-in period, make the required payments into the trust fund annually, no later than 30 days after the anniversary date of the first payment.

* The numbers correspond to the paragraph numbers in Section B.

ATTACHMENT III-1 (continued)

RCRA TRUST FUND CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
"	___	After the pay-in period is completed, make payment (or provide alternative assurance) within 60 days after any change in cost estimates that makes the current cost estimate exceed the value of the trust fund.
"	___	If the owner or operator wishes to object to the trustee's annual valuation statement, object, in writing, to the trustee's investment activities or to expenses levied against the trust fund within 90 days after receiving the statement.
"	___	Request a release of funds from the trust fund when the value of the trust fund exceeds the current cost estimates.
(6)	___	When the trustee enters bankruptcy or loses its authority to act as a trustee, obtain a new trustee or alternative financial assurance within 60 days.
(7)	___	If the owner or operator is dissatisfied with the performance of the old trustee, the old trustee resigns, or the old trustee ceases to qualify to act as trustee, appoint a new trustee, subject to agreement by the old trustee and the Regional Administrator.
(8)	___	When the owner or operator begins paying for final closure, submit itemized bills and request reimbursement from the trust fund.
"	___	When the owner or operator pays for post-closure care, submit itemized bills and request reimbursement from the trust fund.
(9)	___	Request approval to terminate the trust and release of remaining funds (1) when alternate assurance is substituted, and (2) when released from closure or post-closure financial assurance requirements by the Regional Administrator.

* The numbers correspond to the paragraph numbers in Section B.

ATTACHMENT III-2

RCRA TRUST FUND CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator should ensure that:

Paragraph Number *

(1) ___ The trustee financial institution is qualified.

(2) ___ For interim status facilities, by the effective date of the regulations:

___ An originally signed duplicate of the trust agreement, including Schedules A and B, is submitted to the Regional Administrator;

___ The trust agreement is signed by the owner or operator and the trustee;

___ The trust agreement is properly acknowledged;

___ The amount of coverage is adequate; and

___ The first payment is made.

" ___ For new permitted facilities: (1) the trust agreement must be submitted to the Regional Administrator at least 60 days before hazardous waste is first received at the facility; (2) the initial payment into the trust fund must be made before hazardous waste is first received at the facility; and (3) a receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator by this date.

" ___ The wording of the trust agreement is identical to that in the regulations.

(3) ___ Relevant information is recorded.

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* The numbers correspond to the paragraph numbers in Section C.

ATTACHMENT III-2 (continued)

RCRA TRUST FUND CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *		
(4)	___	Annual payments are being made during the pay-in period in the proper amount and no later than 30 days after each anniversary date of the first payment, using this auditing procedure:
	___	Obtain the closure and/or post-closure cost estimates;
	___	Compute the value of each variable in (CE-CV)/Y;
	___	Determine the required payment;
	___	Contact the trustee to allow a comparison of the actual payment with the required payment.
"	___	After completion of the pay-in period, additional deposits are made or alternative assurance obtained within 60 days after any change in the current cost estimates that makes the current cost estimates exceed the value of the trust.
"	___	Within 60 days after receiving a request for release of funds because the value of the trust exceeds the current cost estimates, the request is approved, but only when the fund actually exceeds the current cost estimates by the amount claimed.
(5)	___	Authorization is granted for a change in trustees only when the new trustee is qualified.
"	___	If existing trustees enter bankruptcy or do not remain qualified, alternate assurance is obtained within 60 days.

* The numbers correspond to the paragraph numbers in Section C.

ATTACHMENT III-2 (continued)

RCRA TRUST FUND CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *		
(6)	___	Requests for reimbursement for closure and/or post-closure expenses are approved within 60 days after they are received, but only when itemized bills are submitted and the expenses are in accordance with the plan or otherwise justified.
"	___	If the Regional Administrator has reason to believe that the closure costs will significantly exceed the value of the closure trust fund, complete reimbursement is withheld until closure is completed.
(7)	___	Requests for termination of the trust and return of any funds remaining in the trust are approved in writing when (1) alternate financial assurance is substituted or (2) the owner or operator has been released from closure or post-closure financial requirements.

* The numbers correspond to the paragraph numbers in Section C.

ATTACHMENT III-3

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

TRUST AGREEMENT, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of State] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert "incorporated in the State of _____" or "a national bank"], the "Trustee."

WHEREAS, the United States Environmental Protection Agency, "EPA," an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of the facility,

WHEREAS, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein,

WHEREAS, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Cost Estimates. This Agreement pertains to the facilities and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, and the current closure and/or post-closure cost estimates, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of EPA. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payment for Closure and Post-Closure Care. The Trustee shall make payments from the Fund as the EPA Regional Administrator shall direct, in writing, to provide for the payment of the costs of closure and/or post-closure care of the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the EPA Regional Administrator from the Fund for closure and post-closure expenditures in such amounts as the EPA Regional Administrator shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the EPA Regonal Administrator specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depositary even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depositary with other securities deposited

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate EPA Regional Administrator a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the EPA Regional Administrator shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Regional Administrator, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Regional Administrator to the Trustee shall be in writing, signed by the EPA Regional Administrators of the Regions in which the facilities are located, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Notice of Nonpayment. The Trustee shall notify the Grantor and the appropriate EPA Regional Administrator, by certified mail within 10 days following the expiration of the 30-day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

during that period. After the pay-in period is completed, the Trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the appropriate EPA Regional Administrator, or by the Trustee and the appropriate EPA Regional Administrator if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Regional Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of [insert name of State].

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

specified in 40 CFR 264.151(a)(1) as such regulations were constituted on the date first above written.

[Signature of Grantor]

[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

ATTACHMENT III-3 (continued)

SAMPLE CERTIFICATION OF ACKNOWLEDGMENT
FOR RCRA TRUST FUND AGREEMENT
(FROM 40 CFR 264.151(a), EMPHASIS ADDED)

The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in §§264.143(a) and 264.145(a) or §§265.143(a) or 265.145(a) of this chapter. State requirements may differ on the proper content of this acknowledgment.

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

ATTACHMENT III-3 (continued)

SAMPLE SCHEDULE A

This Agreement demonstrates financial assurance for the following cost estimate(s) for the following facility(ies):

U.S. Environmental Protection Agency Identification Number of Facility	Name of Facility	Address of Facility	Cost Estimates for Which Financial Assurance Being Demonstrated by This Agreement	
	East Minor Facility	42 Main Street Los Tunas, California 90006	Closure	$110,000
			Post-Closure	$ 62,000
			Total	$172,000

The cost estimates listed here were last adjusted on July 1, 1982.

ATTACHMENT III-3 (continued)

SAMPLE SCHEDULE B

The Fund is established initially as consisting of the following property:

$17,200 (seventeen thousand, two hundred dollars), as evidenced by Midtown National Bank Cashier's Check Number 14,282, dated August 1, 1982.

ATTACHMENT III-4

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

This attachment shows how the first two required payments into a trust fund are calculated for three sample facilities. Note that all calculations, trust fund values, and inflation factors are hypothetical.

Example 1

Assumptions:

(1) The facility has interim status.

(2) The trust fund is designed to cover both closure and post-closure care.

(3) The closure plan estimates that the remaining operating life of the facility is 10 years.

(4) The total current closure and post-closure cost estimates is $150,000.

(5) The inflation factor during the first year is 1.10.

Calculations:

All payments are calculated using the formula:

$$\frac{CE-CV}{Y}$$

Where

CE is the current cost estimate
CV is the current value of the trust fund, and
Y is the number of years remaining in the pay-in period.

For the first payment here,

CE = $150,000
CV = 0 (No payments into the trust fund have yet been made.)
Y = 10 (The pay-in period for interim status facilities is the shorter of 20 years or the remaining operating life of the facility.)

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

Thus, the first payment is

$$\frac{CE-CV}{Y} = \frac{\$150,000-0}{10} = \$15,000$$

The second payment calculation requires the value of the trust fund after one year. Assume the trustee valued the investments and other assets comprising the trust at $16,500 (the value of the trust fund has increased because the fund has been invested for one year). The values for the second payment calculation are therefore:

CE = $150,000 x 1.10 (1.10 is the inflation factor.)
CV = $16,500
Y = 9 (One year has passed in the pay-in period.)

The second payment required is:

$$\frac{CE-CV}{Y} = \frac{\$165,000-16,500}{9} = \$16,500.$$

Example 2

Assumptions:

(1) The facility has interim status.

(2) The trust fund covers closure only.

(3) The remaining operating life is 25 years.

(4) The current closure cost estimate is $80,000.

(5) The inflation factor during the first year is 1.15.

Calculations:

For the first payment,

CE = $80,000
CV = 0
Y = 20 (20 years is shorter than the remaining operating life)

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

The first payment is:

$$\frac{CE-CV}{Y} = \frac{\$80,000-0}{20} = \$4,000$$

To compute the second payment, assume that the value of the trust is only $3,150 after the first year (the trust's investments were not very successful). The second payment can be calculated as follows:

CE = 80,000 x 1.15 = $92,000
CV = $3,150
Y = 19

$$\frac{CE-CV}{Y} = \frac{\$92,000-\$3,150}{19} = \$4,676$$

Example 3

Assumptions:

(1) The facility has a 10-year permit.

(2) The trust fund covers both closure and post-closure care.

(3) The remaining operating life of the facility is 15 years.

(4) The total current cost-estimate is $120,000.

(5) The inflation factor for the first year is 1.12.

Calculations:

For the first payment,

CE = 120,000
CV = 0
Y = 10

and

$$\frac{CE-CV}{Y} = \frac{\$120,000-0}{10} = \$12,000$$

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

For the second payment, assume that the trust fund is worth $12,600. The second payment can be calculated:

CE = $120,000 x 1.12 = $134,400
CV = $12,600
Y = 9

$$\frac{CE-CV}{Y} = \frac{\$134,400-\$12,600}{9} = \$13,533$$

Example 4

Assumptions:

(1) In year 1, the facility has interim status.

(2) By year 2, the facility obtains general status with a 10-year permit.

(3) The trust fund covers both closure and post-closure care.

(4) The remaining operating life of the facility is 15 years.

(5) The total current cost-estimate is $150,000.

(6) The inflation factor during the first year is 1.11.

Calculations:

For the first payment,

CE = $150,000
CV = 0
Y = 15

Thus the first payment is:

$$\frac{CE-CV}{Y} = \frac{\$150,000-0}{15} = \$10,000$$

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

In the second year, the facility is in general status, and a new pay-in period will apply. The pay-in period is equal to the shorter of the remaining operating life of the facility or the term of the initial permit. The remaining operating life is equal to 14 years, while the permit term is 10 years; thus, the new pay-in period is 10 years.

To compute the second payment, assume that the trust fund is now valued at $10,800. The second payment can be calculated as follows:

$$CE = \$150,000 \times 1.11 = \$166,500$$
$$CV = \$10,800$$
$$Y = 10$$

and $$\frac{CE-CV}{Y} = \frac{\$166,500-\$10,800}{10} = \$15,570$$

IV. ESTABLISHING FINANCIAL RESPONSIBILITY USING SURETY BONDS

A. INTRODUCTION

This chapter describes how owners or operators can fulfill their RCRA financial requirements using SURETY BONDS. Surety bonds are common in business when one party, in order to protect itself in a transaction, insists that another party obtain such a bond. Only RCRA surety bonds are discussed here, however. A surety bond is a contract which an owner or operator (sometimes called the PRINCIPAL) can enter into with a qualified surety company (called the SURETY). Under this contract, the surety guarantees to EPA (sometimes called the OBLIGEE) that the closure and/or post-closure obligations of the owner or operator will be fulfilled. Of course, the owner or operator must pay the surety for this guarantee, because the surety will be liable for these obligations should the owner or operator fail to fulfill them.

The RCRA regulations allow two types of surety bonds, FINANCIAL GUARANTEE BONDS and PERFORMANCE BONDS, although this latter type of bond can be used only at permitted facilities and can not be combined with other financial assurance mechanisms. Financial guarantee bonds, as the name implies, simply assure EPA that, if the owner or operator fails to fund the STANDBY TRUST FUND or provide appropriate alternative financial assurance for closure and/or post-closure care, the surety will fund the standby trust fund up to a stated amount. Performance bonds, on the other hand, may be carried out either by paying for or actually providing closure and/or post-closure care. Both types of bonds limit the liability of the surety to the face amount of the bond, called the PENAL SUM. As cost estimates increase, this penal sum may be increased upon agreement of the owner or operator and the surety. The bond may provide, by way of an optional RIDER, that the penal sum can be increased up to 20 percent in any year, without a new agreement between the parties.

EPA expects, on the basis of information received from sureties, that very few sureties will be willing to write surety bonds, at least initially, and that many of those sureties that will write them will do so only for their largest, most creditworthy clients. The long-term nature of the obligation guaranteed, the requirement that the surety pay the penal sum in the event the surety attempts to cancel the bond and the owner cannot obtain alternate assurance, and the unfamiliarity of sureties with the hazardous waste industry all make these bonds unattractive to sureties. Nevertheless, owners and operators have asked that surety bonds be allowed as a financial assurance mechanism. EPA believes that, in the future, the availability of RCRA surety bonds may increase as more facilities are permitted, especially in instances where remaining facility life is relatively brief and the time of closure is highly predictable.

The regulations pertaining to RCRA surety bonds are as follows:

EXHIBIT IV-1

RCRA SURETY BOND REGULATIONS

Topic	Interim Status	Permitted Facilities
Closure Bond		
• Financial Guarantee Bond	40 CFR §265.143(b)	40 CFR §264.143(b)
• Performance Bond	NA	40 CFR §264.143(c)
Post-Closure Bond		
• Financial Guarantee Bond	40 CFR §265.145(b)	40 CFR §264.145(b)
• Performance Bond	NA	40 CFR §264.145(c)
Wording of Bonds		
• Financial Guarantee Bond (closure and/or post-closure)	40 CFR §264.151(b)	40 CFR §264.151(b)
• Performance Bond (closure and/or post-closure)	NA	40 CFR §264.151(c)

Source: Title 40, Code of Federal Regulations (CFR).

NA: Not applicable.

B. RCRA SURETY BOND REQUIREMENTS

This section describes the responsibilities of owners or operators in fulfilling the surety bond requirements established under RCRA. Except for the last part of this section dealing with permitted facilities, the discussion here covers only financial guarantee bonds, since they are the only type of bond allowed at interim status facilities. Apart from the few differences noted in the last section, the requirements for financial guarantee bonds also apply to performance bonds. A checklist of the responsibilities of owners or operators appears as Attachment IV-1 at the end of this chapter.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications for Surety Company. An owner or operator wishing to use a surety bond to fulfill its RCRA closure and/or post-closure requirements must enter into a contract with a qualified surety. Qualified sureties are those listed by the U.S. Department of the Treasury in its CIRCULAR 570, which is published annually on approximately July 1 and updated periodically in the Federal Register. To obtain the most up-to-date information, owners or operators can contact the Audit Staff of the Department of the Treasury (telephone number: (202) 634-5010). Care should be used in consulting Circular 570 since many sureties have similar names.

Circular 570 also lists the maximum amount which each surety can guarantee in one bond, called the UNDERWRITING LIMITATION. A surety may only issue a surety bond exceeding this amount when it brings another company into the surety agreement to help share the risk. Even several sureties acting together may not exceed the total of their individual underwriting limitations, however. Finally, Circular 570 lists the states in which each qualified surety is licensed to enter into a surety bond; a RCRA surety bond must be signed in one of those states.

In addition, owners or operators must also identify a financial institution qualified to establish a STANDBY TRUST FUND (discussed below). The qualifications of trustee institutions are described in Section B.1 of Chapter III.

2. Wording and Amount of Assurance. The wording required for surety bonds is specified in the regulations and both the owner or operator and the surety must certify that the bond matches this wording exactly. The bonds are shown in Attachments IV-3 and IV-4 at the end of this chapter. The penal sum of a RCRA surety bond, together with any amount being assured by other mechanisms (see Section B of Chapter II for information on combinations of mechanisms), must be in an amount at least equal to the current closure and post-closure cost estimates.

The owner or operator must also establish a standby trust fund[1] to accompany each RCRA surety bond. The moneys necessary to pay for closure and/or post-closure care will be disbursed from this fund. The fund is often initially established with a NOMINAL SUM, and must be funded in an amount equal to the penal sum of the bond before the beginning of final closure of the facility or within 15 days after an order by the Regional Administrator or a U.S. court to begin closure (See Attachment IV-3). Any payments made under the bond will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Regional Administrator. A standby trust fund is not to be confused with an ordinary RCRA trust fund (described in Chapter III), although a standby trust is subject to the same requirements except that:

(a) annual payments into the standby trust fund are not required (only the nominal initial payment mentioned above is usually made);

(b) Schedule A of the trust agreement need not be updated;

(c) Annual valuations by the trustee are not required; and

(d) The trustee need not send notices of nonpayment.

A standby trust fund is also required with a letter of credit. The standby trust fund is not a financial assurance mechanism under RCRA, it merely facilitates drawing on surety bonds and letters of credit that are used as financial assurance. The standby trust fund must be worded exactly as required for trust funds. See Attachment III-3 and discussion in Section B.2 of Chapter III.

3. Obtaining a Surety Bond. The first step an owner or operator should take in approaching a broker or agent for a surety company is to check that the broker or agent is authorized by a qualified surety to issue RCRA bonds in the amount desired. (The owner or operator can check the qualifications of sureties in CIRCULAR 570, as discussed above.) Sureties give brokers and agents authority to sell surety bonds for them in a written document called a POWER OF ATTORNEY. If the owner or operator has any doubt about the authority of the broker to act on the surety's behalf, to issue RCRA bonds, or to issue bonds in the amount needed, he should ask for a copy of the power of attorney.

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[1]Even if a combination of financial assurance mechanisms is used, only one trust fund is necessary. If an owner or operator uses a trust fund together with a surety bond, the trust fund may be used as the standby trust fund. If a financial guarantee bond and letter of credit are both used, one standby trust fund is sufficient. Remember, however, that a performance bond may not be used in combination with other mechanisms.

The broker or agent will undoubtedly ask for detailed information on the facility and the owner or operator applying for the surety bond. This information may include any of the financial and operating data listed and the facility visit mentioned in Section D of Chapter II.

Once the broker or agent evaluates this information, he will be able to tell the owner or operator if a surety bond can be issued and if so, on what terms. The terms may include not only the premiums required but also a requirement that the owner or operator provide a certain amount of COLLATERAL to reduce the surety's risk. Even if collateral is not required, the surety may be willing to lower its premiums if collateral is provided voluntarily. The owner or operator will probably also want the optional rider that is permitted by the regulations. This could save it from having to renegotiate a new surety bond each year that cost estimates increase.

4. Submission of Documents to EPA. To complete the surety bond, both the surety and the owner or operator will have to sign it; someone properly authorized to act on the behalf of either or both parties may sign instead. The owner or operator must then submit the surety bond and an ORIGINALLY SIGNED DUPLICATE of the standby trust agreement to the Regional Administrator before the effective date of the regulations.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

5. Updating Coverage. During the operating life of the facility, when closure or post-closure cost estimates are adjusted due to inflation or new estimates are prepared because of a change in closure and/or post-closure plans, the owner or operator is responsible for ensuring either that the bond's penal amount is increased sufficiently or that other financial assurance is given. This must be done--and evidence of the increase in the penal sum submitted to the Regional Administrator--within 60 days after the increase in cost estimates. Further increases in financial assurance are not required after closure.

The bond may (but is not required to) provide for an optional RIDER to permit increase in the penal sum by up to 20% per year. This rider allows an owner or operator to increase the amount of its coverage without having to renegotiate for additional surety bond coverage each time the closure or post-closure cost estimates increase. If there is no rider or the rider is not sufficiently large, the owner or operator may nevertheless agree with the surety to increase the face amount. Alternatively, the owner or operator may obtain another financial responsibility instrument to cover the increase (combinations of instruments covering one facility are discussed in Section B of Chapter II).

The regulations provide that the owner or operator may apply to the Regional Administrator for a decrease in the amount of bond coverage if the cost estimates decrease. The Regional Administrator will probably require

supporting documentation such as the closure and/or post-closure plans and cost estimates in order to respond to a request to decrease coverage. This is further described in Section E.1 of Chapter II.

6. Maintaining Assurance. The owner or operator is required to obtain alternative financial responsibility assurance within 60 days after bankruptcy of the surety or the removal of the surety's name from Circular 570.

In addition, assurance must be maintained until ownership of or operating responsibility for the facility changes, and the new owner or operator has met the applicable financial responsibility requirements.

Finally, the owner or operator may substitute an alternate mechanism of financial assurance so long as there is no lapse in coverages. See Section E.4 of Chapter II.

7. Cancellation of the Surety Bond by the Issuer. The surety company may also cancel the bond. In order to exercise this right, a surety company must send notices of cancellation to both the owner or operator and the Regional Administrator. Cancellation may not occur during the 120 days beginning on the date of receipt of these notices. The owners or operator will have 90 days to provide alternate financial assurance and obtain written approval from the Regional Administrator of the new assurance. See Section E.3 of Chapter II. If the owner or operator fails to provide this assurance and obtain such approval within the 90 days, the Regional Administrator will direct the surety to pay the penal sum into the standby trust.

8. Drawing on Funds for Closure and Post-Closure. Financial guarantee bonds are designed to guarantee that funds will be available to pay for closure and post-closure care. Thus, if the owner or operator does not fulfill its obligation to fund the standby trust fund in the amount of the penal sum or to obtain alternative financial assurance when required, the surety will be responsible for funding the standby trust fund. Specifically, the surety will be required to pay the penal sum of the bond into the standby trust in these circumstances:

a. The owner or operator has failed to fund the standby trust fund in the amount of the cost estimate for closure and/or post-closure care before the beginning of final closure of the facility;

b. The Regional Administrator or a court has ordered closure to begin and the owner or operator has not funded the standby trust within 15 days; or

c. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days.

If the owner or operator properly funds the standby trust fund or otherwise fulfills its obligations under the regulations, funds will not be drawn from the surety bond.

9. Termination of Bond. The owner or operator should request the approval of the Regional Administrator to terminate the bond in two situations: (1) when alternate financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when released from applicable RCRA requirements (see Section G of Chapter II). Upon receiving the Regional Administrator's written consent, the owner or operator should forward a copy of it to surety along with a request that the bond be terminated. The surety bond can only be terminated with the written consent of the Regional Administrator. At the same time, the owner or operator should request the Regional Administrator to approve the termination of the standby trust fund unless the owner or operator is maintaining assurance with a letter of credit and without a trust fund. Procedures for terminating the standby trust fund are identical to the procedures for terminating trust funds, discussed in Section B.9 of Chapter II.

PERMITTED FACILITIES

There are only a few differences between interim status and permitted facilities with respect to financial assurance through surety bonds. The main difference is the types of bonds allowed. Financial guarantee bonds may be used at both interim status and permitted facilities and may be used in combination with other financial assurance mechanisms; performance bonds, however, may be used only for permitted faciliites, not for those with interim status, and they may not be used in combination with other financial assurance mechanisms.

Performance bonds assure performance in accordance with closure and/or post-closure plans and other permit requirements. Upon default by the owner or operator, a surety may fulfill its obligations under such a bond by either securing performance in accordance with the plans or by depositing the penal sum into the standby trust.

In many respects, performance bonds are like financial guarantee bonds, although there are some differences. The owner or operator may request a reduction in the penal sum of a performance bond in the same manner as for a financial guarantee bond. With a performance bond covering post-closure care, such a request may even be made during the period of post-closure care.

Performance bonds state that the surety will either have to perform closure and/or post-closure care (in accordance with (1) the permit requirements, (2) the plans, and (3) RCRA regulations) or pay the penal sum into the standby trust fund in the following circumstances:

a. The owner or operator fails to fulfill its closure and/or post-closure obligations, even though closure may occur sooner than expected or the requirements in the plans, regulations, and/or permit have changed; or

b. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days.

The only other major difference between the surety bond requirements for permitted facilities and those with interim status is that for new permitted facilities, the surety bond must be submitted to the Regional Administrator at least 60 days before the date on which hazardous waste is first received at the site and the bond must be effective before the date on which hazardous waste is first received.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the duties of the Regional Office in reviewing surety bonds for RCRA financial assurance and ensuring satisfaction of requirements. A summary checklist appears in Attachment IV-2.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Surety and Broker or Agent. The first step that the Regional Administrator must take is to ensure that the surety is qualified. Circular 570 (published annually on approximately July 1) must be reviewed to check that the surety is listed, is licensed to do business in the state in which the bond is signed, and has an underwriting limitation equal to or larger than the bond amount. Because many sureties have similar names, great care should be exercised in consulting Circular 570. The most recent information can be obtained by contacting the Audit Staff of the Department of the Treasury (telephone number: (202) 634-5010). The bond amount can exceed the surety's underwriting limitation if the surety properly indicates that other sureties are sharing the risk. In particular, if the surety is using REINSURANCE, a Treasury reinsurance form must be submitted with the bond or within 45 days thereafter. If COSURETIES are being used, the original bond must reflect that fact. In all cases, the Regional Administrator will want to ensure that the total underwriting limitation of all sureties involved is not exceeded.

For each surety bond submitted, the Regional Administrator should request to see the broker or agent's POWER OF ATTORNEY and review it to make certain that the broker or agent has authority to act for the surety on this type of bond (hazardous waste) and in the amount of the bond.

The qualifications of the trustee institution for the standby trust fund must also be verified. The qualifications required are the same as for the RCRA trust fund. See Section C.1 of Chapter III for procedures.

2. Conformity to Other Requirements. For interim status facilities, the financial guarantee bond must establish financial assurance by the effective date of the financial responsibility regulations. For permitted facilities, the effective date of the bond must be no later than the date that hazardous waste is first received at the site and the bond must be submitted to the Regional Administrator at least 60 days before that date. In either case, the wording of the surety bond must be identical to that specified in the regulations and signed by the appropriate parties. It must also be accompanied by an originally signed duplicate of the standby trust agreement (See Section B, Part 2 of this chapter). The penal sum of the bond must at least equal the closure and/or post-closure cost estimates unless additional assurance has been properly submitted.

3. Recordkeeping and Tracking Systems. As surety bonds and standby trust agreements are received, relevant information should be recorded including the name, address, and EPA Identification Number of the covered facilities; the name of the surety, bond number, and trustee; amount of coverage for each facility and the effective date; and information verification procedures performed. Automatic data processing systems can be used for this. A list of surety bonds in effect should be kept not only under the owner or operator's name, but also under the name of each surety company and trustee institution so that, in case of bankruptcy or ineligibility or other reasons, it will be easy to determine which owners or operators need to obtain financial assurance elsehwere. This system can be used to keep track of mergers and changes in the names of sureties.

SUBSEQUENT RESPONSIBILITIES

4. Updating Surety Bonds. As cost estimates for closure and post-closure care are adjusted annually for inflation or revised based on new plans, the Regional Administrator has several tasks. First, the Regional Administrator will need to check that increases in cost estimates are covered within 60 days by increases in the penal sum of surety bonds or by other added financial assurance and that owners and operators have submitted evidence of any increases in the penal sum. Automated data processing can be used to assist in this task. See Chapter II, Section I.

Second, while increases in coverage are mandatory when cost estimates increase during the operating life of the facility, decreases in coverage are not required when cost estimates decrease. The Regional Administrator should allow the amount of a performance bond for post-closure care to be decreased after the facility is closed only if the owner or operator demonstrates that the amount of the bond exceeds the remaining cost of post-closure care. Future inflation rates are uncertain and cost estimates are not subject to increase due to inflation after closure. See Section E of Chapter II for a more detailed discussion.

5. Maintaining Assurance. Regional Administrators will have to maintain up-to-date lists of what sureties are currently listed on Circular 570, the states where they are licensed, and what their underwriting limitations are. One person in the office should be made responsible for regularly updating information on qualifying sureties based on the notices regarding sureties sent by EPA headquarters. In addition, a list of surety bonds in effect must be kept on the HWDMS not only under the owner or operator's name, but also under each surety's name so that in the case of bankruptcy or other reason for a financial institution failing to continue to qualify under the RCRA regulations, it is easy to determine which owners or operators need to obtain financial assurance elsewhere. This system could also be used to keep track of mergers and changes in the names of sureties. Automated data processing can be used to assist these efforts and can be particularly useful in helping the Regional Administrator assure that alternative assurance is obtained within 60 days after the surety becomes bankrupt or otherwise ceases to qualify. See Section I of Chapter II.

In the event of transfer of ownership or operation of a facility, the Regional Administrator should verify that assurance maintained until the new owner or operator satisfies the financial requirements.

The Regional Administrator should approve requests to use alternate assurance mechanisms if no lapse in coverage will result.

6. Cancellation of the Surety Bond by the Issuer. Sureties may not cancel RCRA surety bonds until after they send notice of cancellation to both the owner or operator and the Regional Administrator. Cancellation may not occur during the 120 days beginning on the date of receipt of these notices. The Regional Administrator will have to ensure that owners or operators obtain acceptable alternative means of financial assurance within 90 days after receipt of these notices. Cancellation will only be allowed if the owner or operator provides other financial assurance within this period. If it is not obtained, the surety must fulfill its obligations under the bond.

Upon receipt of a notice from a surety, Regional Office staff should contact the owner or operator to determine (1) the date it received the notice from the insurer and (2) its plans to provide alternate assurance or fund the standby trust fund. Both pieces of information will be essential for determining the nature and timing of future agency action.

7. Drawing on the Surety Bond. The Regional Administrator will have to make demand upon the surety to fulfill its obligations under a financial guarantee bond when:

a. The owner or operator has failed to fund the standby trust fund in the amount of the cost estimate for closure and/or post-closure care before the beginning of final closure of the facility;